THE ARBITRATION JOURNAL

PUBLISHED BY THE
AMERICAN ARBITRATION ASSOCIATION
IN COLLABORATION WITH THE
CHAMBER OF COMMERCE OF THE STATE OF NEW YORK
AND THE
INTER-AMERICAN COMMERCIAL ARBITRATION COMMISSION

VOLUME 3 JANUARY, 1939 NUMBER 1

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THE ARBITRATION JOURNAL is published quarterly, in January, April, July and October, by the American Arbitration Association, in collaboration with the Chamber of Commerce of the State of New York and the Inter-American Commercial Arbitration Commission, and is supplied to members of the collaborating organizations without extra charge.

The annual subscription to non-members is $2.00; Canada, $2.25; foreign, $2.50 (single copies, 60 cents), and should be paid to the American Arbitration Association, 8 W. 40th Street, New York City. Reprints ordered at the time of publication may be obtained at cost.

Applications for membership in the Association, subscriptions and correspondence relating to THE JOURNAL, books for review, etc., should be sent to George A. Little, Executive Editor, 8 W. 40th Street, New York City.

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THE ARBITRATION JOURNAL

VOL. 3 JANUARY, 1939 NO. 1

IN THIS ISSUE

WITH this issue the JOURNAL passes its second milestone, with an ever-widening circle of friends and with no lessening of interesting developments in every field of arbitration activity—commercial, industrial and international. Developments in each of these fields are presented by outstanding authorities in this issue.

Much is known about arbitration law, tribunals and procedure and little about the administering and sponsoring bodies behind them. The JOURNAL presents the first of a series of articles describing these sponsoring organizations (p. 3), as part of the American Design for Peace.

In a description of the Industrial Court of New York's $500,000,000 dress industry (p. 28) Mr. Uviller presents what he calls a civilized method of settling industrial disputes.

After a study of the most sucessful industrial peace formulas, Mr. Tongue arrives at interesting conclusions as to what factors have influenced the development of grievance machinery and the results which have followed its operation (p. 34).

Twenty-one American Republics at the Lima Conference gave notice to the world that they stand together to defend themselves against threats to their peace and their institutions. Mr. Carson summarizes the results of the Conference from a business observer's point of view (p. 75).

In his article on p. 56, Prof. Bentwich describes the adjudication of disputes between members of the British Commonwealth and tells why a permanent tribunal to hear and determine such disputes has not been established.

In Canada, as in the United States, employers of labor lean to self-regulation rather than Governmental regulation. Mr. Nicholls analyzes the facts and situation with respect to arbitration clauses in labor agreements and their legal effect (p. 60).

In recent years many insurance companies have adopted arbitration as a "new safeguard against old risks". Mr. Van Schaick finds that the germ of common sense which underlies the principles of arbitration has a wide significance in the insurance field (p. 18).

In the section on Arbitration Law (p. 83), Mr. Watson discusses the statute of frauds as a defense in a proceeding to compel arbitration, in the light of a recent case; Mr. Sprague comments on two recent admiralty cases, and Mr. Derenberg reviews current court decisions.

FOREWORD

As a Foreword to the first issue of the New Year, the JOURNAL takes pleasure in reproducing a message received from President Franklin D. Roosevelt by the Inter-American Commercial Arbitration Commission, on the occasion of the installation of the Honorable Spruille Braden as Honorary Chairman and Mr. Thomas J. Watson as Chairman of the Commission. In his message, which was read at a luncheon given in honor of Ambassador Braden and Mr. Watson in New York on January 17, 1939, President Roosevelt said:

> It is unnecessary for me to emphasize anew the importance which I attach to all responsible activity destined to strengthen further the ties of friendship and understanding which happily exist between the peoples of the American Republics. The objectives of the Inter-American Commercial Arbitration Commission seem to me clearly directed to further these ends.
>
> Mr. Braden's association with your Commission brings to mind the notable achievement of the Chaco Peace Conference, at which he was the representative of the United States, in solving through pacific negotiation a dispute which had long continued between two of our sister republics. The Conference provided an outstanding practical contribution to the settlement of inter-American differences through peaceful and equitable means. It provided an admirable example of the practical use to which patience, open-mindedness, square dealing, goodwill and the services of impartial friends can be put toward the settlement of all disputes, whether they be political or commercial.
>
> I trust that the field for the usefulness of your Commission will continue to develop, and with my cordial greetings to your new Chairman, Mr. Thomas J. Watson, I send my best wishes to your organization.
>
> FRANKLIN D. ROOSEVELT
>
> THE WHITE HOUSE
> January 16, 1939

AMERICAN COMMERCIAL ARBITRATION*

THE AMERICAN ARBITRATION ASSOCIATION

BY

FRANKLIN E. PARKER, JR.†

ONE of the features of THE ARBITRATION JOURNAL for 1939 will be a description of the leading organizations which sponsor arbitration and administer tribunals. Much has been written about the tribunals, but less is known about the organizations which make modern organized arbitration effective and practical. The first of this series describes the American Arbitration Association, its organization, administration and activities in the United States.

ORGANIZATION AND ADMINISTRATION

Origin. In 1925, there were two national organizations engaged solely in the development of commercial arbitration in the United States, the Arbitration Society of America and the Arbitration Foundation, both of quite recent origin. As these organizations covered the same field and were financially supported principally from the same sources, it was decided to merge them. Such a merger was effected in 1926 under the name of the American Arbitration Association and the records, memberships and personnel of the two original organizations passed to

* Court decisions relating to commercial arbitration will be found in the section on Arbitration Law, beginning on p. 83.

† President of the American Arbitration Association; member of the New York Bar.

the Association, under a new charter and by-laws. The new Association began its activities on January 29, 1926.

This merger was effected through a Temporary Organization Committee. Its members were appointed by the consolidating organizations and by the Chamber of Commerce of the State of New York, with which the Arbitration Foundation was identified through the Chairman of its Arbitration Committee. The members of this Temporary Committee were Lucius R. Eastman, Frank H. Sommer, Anson W. Burchard, Henry Ives Cobb, John F. Fowler, James H. Post and Felix M. Warburg. The Chairman of the Committee was Lucius R. Eastman, to whom fell the task of reconciling the various interests of the consolidating organizations. The report of this Committee, issued in 1927, said:

> It has been necessary to adopt certain general policies for the guidance of ourselves and of others who use our facilities. These may be summarized, in part, as follows:
>
> (1) The Association limits its field of activity to commercial disputes; it has, therefore, refused to be drawn into political or labor controversies. (2) The activities of the Association are confined to the western continent, except in the matter of certain international publications which it assists in financing. (3) The development of arbitration under uniform state statutes, rather than the settlement of commercial disputes in other ways, claims the attention of the Association. (4) The construction of a foundation of accurate knowledge is being carried on through the cooperation of universities and faculties trained in research work. (5) The establishment of arbitration facilities through trade and commercial organizations is the purpose of opening new fields of industry to arbitration. (6) The cooperation of the Judiciary and the Bar was early seen to be essential to the extension of commercial arbitration and the Association has endeavored to bring business and law into accord. (7) The scientific organization of arbitration facilities about each commodity, through clauses in contracts, is one of the definite aims of the Association. (8) The avoidance of all duplication of effort and of an excessive overhead, and the equitable distribution among the various industries of the cost of the administration of a central organization have been kept constantly in mind.

The members of this Temporary Organization Committee and the early financial supporters of the new Association were virtually its founders; for without their help it must have failed. Such supporters were many, but outstanding among them were Jules S. Bache, Anson W. Burchard, Homer A. Dunn, Samuel Fels, Michael Friedsam, Moses H. Grossman, Robert H. Montgomery, James H. Post, John D. Rockefeller, Jr., Julius Rosenwald, Charles M. Schwab, Franklin Simon and Felix M. Warburg.

Incorporation. The Association is organized under the Membership Corporation Law of the State of New York for educational and scientific purposes, namely, to promote the knowledge and spread the use of arbitration throughout the United States and foreign countries; to advance the use of arbitration and mediation as a means of settlement of private controversies in the field of commerce and industry; to adopt appropriate means for the dissemination of information; to study arbitration; to establish and maintain tribunals and panels of arbitrators; to collaborate in improving arbitration law; and to erect, lease, own, operate and conduct a building for the purposes of the Corporation. Under its Charter, the Association is non-profit-making; it is also non-political and non-partisan in its personnel, character and activities.

Membership. Associations, corporations, partnerships and individuals, located in the United States and foreign countries, are eligible to membership. The Board of Directors has established four classes of membership: Active ($100), Sustaining ($50), Associate ($25) and Professional ($10). The membership fees sustain the work generally and members are entitled annually to arbitration services up to the amount of their membership, and to all other privileges. The professional memberships are for lawyers, educators and members of other professions who are interested generally in advancing the principles and practice of arbitration.

Board of Directors. In accordance with its Charter and By-Laws, the Association is governed by a board of directors. These directors are chosen to represent the public interest, different branches of business and the professions which are interested in arbitration. The Board meets in February, May and November and at such other times as the President of the Association or the Chairman of the Board may call a meeting. The annual meeting is held the last Wednesday in January.

Executive Committee. The active management of the Association is vested in an Executive Committee of 15 members which meets on call of the President of the Association. The present members are: George Backer, George A. Brownell, James S. Carson, William H. Coverdale, Lee J. Eastman, Mrs. John C. Greenway, Charles T. Gwynne, Frederick E. Hasler, Hermann Irion, Thomas H. McInnerney, Malcolm Muir, Wesley

A. Sturges and Sidney J. Weinberg. *Ex officio* members are: Franklin E. Parker, Jr., Lucius R. Eastman and Frances Kellor. Serving under this Committee are the first vice president, who is the non-salaried chief executive, an executive secretary in charge of tribunals, and a secretary in charge of administration.

Departments. The executive officers administer the work through seven departments: (1) Administration, (2) Tribunals, (3) General Research, (4) Legal Research, (5) Education, (6) Publications (including THE ARBITRATION JOURNAL), and (7) International and Foreign Trade Arbitrations.

Advisory Committees. Supplementing the work of these departments are several permanent advisory committees, including separate committees on commercial, industrial and international arbitration, foreign trade tribunals and services, and arbitration law. Made up of experts on these subjects, these committees give to the Association the benefit of their knowledge and training and of their experience with public affairs.

Affiliated Trade Associations and Cooperating Commercial Organizations. There are also approximately 300 national or regional trade associations and commercial organizations affiliated with the Association in its general educational program for advancing the use and knowledge of arbitration.[1] By reason of this cooperation, the Association has not found it necessary to establish branch offices, for the headquarters of these collaborating organizations and their facilities are always available for hearing rooms and for assisting in the conduct of arbitrations. By having members of its National Panel in each locality, who will set up the proceedings and conduct the arbitration under standard rules of procedure and administration, this cooperative plan has worked admirably. Similarly, educational and legislative activities are carried on by these trade and commercial organizations in their respective states and communities, making unnecessary the maintenance of educational branches or the conduct of direct legislative activities. Among the many organizations may be mentioned the National Credit Men's Association, the National Association of Purchasing Agents, the American Institute of Accountants and the American Institute

[1] In its Report for 1932, the American Arbitration Association published a list of cooperating organizations.

of Architects. Noteworthy in this field also is the Ohio Association of Arbitration Tribunals, sponsored by Chambers of Commerce in the five leading cities of Ohio, and affiliated with the American Arbitration Association. Only at enormous cost to the Association could the services of such organizations be duplicated in the special field of arbitration.

Headquarters. The headquarters of the Association occupy the eighteenth floor of Eight West Fortieth Street, New York City, covering 5,200 square feet. These headquarters include administrative offices and hearing rooms and facilities for cooperating trade and commercial organizations which may wish to hold their arbitrations at these headquarters.

Budget. The Association receives funds only for the general purposes of promoting arbitration and for the administration of Tribunals. Its income is derived from its directors and members for general administrative and educational purposes; from case fees and from affiliated organizations for tribunal services; and from individuals, corporations or foundations for general or legal research and publications.

The Association has no endowment and receives no government subsidies or funds. It makes no appropriations to other organizations and its officers and directors receive no compensation or profit. All funds received are used, exclusively, to advance arbitration. An annual budget is approved by the Executive Committee at each fall meeting.

Reports. Three annual reports have been issued and there are two special reports covering the general work of the Association. The two special reports are the Six Year Report, issued in 1932, and the Decennial Report, issued in 1936. No reports on arbitrations are issued, as these records are confidential; but in the Voluntary Industrial Arbitration Tribunal summaries of the questions submitted are compiled for publication. The Association is now resuming its annual reports, believing that these give a more comprehensive and consecutive statement of its activities. Separate reports are issued for each Tribunal.

COMMERCIAL ARBITRATION

American Arbitration Tribunal. The Tribunal established and maintained for the arbitration of civil and commercial disputes

arising out of contracts, which parties desire to arbitrate in accordance with the prevailing arbitration law, is called the American Arbitration Tribunal.[2] The jurisdiction of this Tribunal is limited to the United States and it has facilities in 1,600 cities where an arbitration can be held under the Rules and administration of the American Arbitration Association. Seven thousand members of a National Panel of Arbitrators are resident in these different communities and are available for service when they are needed. When not called upon for actual service, these members have no active duties and no permanent Tribunal is set up. All of these Tribunals are conducted under uniform rules of procedure and the prevailing statutory arbitration laws.

Since its establishment in 1926, civil and commercial cases embracing the following controversies have been referred to the Association: Claims arising out of dissolution of partnerships; allocation of assets in mergers and reorganizations; ownership of stock rights; claims arising out of the handling of stock exchange accounts; rights to dramatic productions; infringement of patent rights; claims for damages for incompetent performances by artists; failure of American agents of foreign manufacturers to fulfill contract terms; compliance with agreement to deliver "when, as and if issued" preferred stock; claims for damages to household goods in storage or transit; fairness to bondholders of protective committee's plan of reorganization; rights to chemical processes; liability of insurance companies to insured under various types of policies; interpretation of building plans and specifications; determination of responsibility for goods injured in processing; damages for breach of chartering agreement; disputes between artists or authors and their agents; damages due to cancellation of leases and other agreements; disputes between husband and wife arising under separation agreements.

These claims have ranged in amounts from a few dollars up to a $2,000,000 claim. A vast amount of property has been protected, business assets have been conserved and commercial peace has been furthered.

[2] Special pamphlets on the *Commercial Arbitration Tribunal* and *The American Arbitrator and His Office* are issued by the American Arbitration Association.

Foreign Trade Tribunal. The American Arbitration Tribunal is also a proper forum for the arbitration of foreign trade controversies which the parties agree shall be arbitrated in the United States. During the past decade there has been a great increase in foreign trade arbitrations held in the United States, and in the prestige in other countries of the Association's awards.

U. S. Branch of the Inter-American Commercial Arbitration Commission Tribunal. The headquarters of the United States Committee of the Inter-American Commercial Arbitration Commission, as well as the offices of the Commission, are with the American Arbitration Association. This Committee has charge of all arbitrations held in the United States under the Rules of the Inter-American Commercial Arbitration Tribunal and conducts educational work in this country.[3]

INDUSTRIAL ARBITRATION

Voluntary Industrial Arbitration Tribunal. Organized originally for the advancement of civil and commercial arbitration and for research in this field, the Association was confronted with a new problem in 1937. The rapid growth of arbitration in industrial disputes and the entry by employers and employees into contracts containing arbitration clauses, in many of which the American Arbitration Association was named to perform services, led it to examine, first, the need for a voluntary method of submitting controversies to arbitration and, second, whether the Association was in a position to undertake this additional service.

This examination convinced the Association that the methods of industrial arbitration should be more elastic. The reluctance of both employers and employees, at this time, to submit to compulsory process under arbitration laws and the experimental nature of the practice required a separate tribunal operated under separate rules. The officers, directors and arbitrators of the Association commanded confidence and prestige in the commercial world, but broader representation to include labor was necessary for the new tribunal. Accordingly the Voluntary

[3] The report of the Inter-American Commercial Arbitration Commission on the first five years of its work, submitted to the Pan American Union for presentation to the 8th Int'l. Conference of American States, is available through the American Arbitration Association.

Industrial Arbitration Tribunal is being developed and administered by an Advisory Committee of its own, upon which are represented industry, labor and the public.

The new Tribunal and its Advisory Committee were established in October 1937 and within the period of 15 months, more than 100 controversies have been submitted and adjudicated. Among the employers using this service the following may be mentioned: National Broadcasting Company, Columbia Broadcasting System, Standard Oil Co. of New Jersey (tanker group and radio operators division), Cheney Brothers, Davega-City Radio, Inc., Associated Men's Wear Retailers of New York, the leading motion picture producers, the theatrical producers of New York City and the Metropolitan Opera Association.

Among the Unions using this service may be mentioned: The Textile Workers Organizing Committee (C. I. O.); United Wholesale & Warehouse Employees (C. I. O.), N. Y., N. J., New England; United Automobile Workers Union, New England (C. I. O.); Actors' Equity Association (A. F. of L.); American Federation of Radio Artists (A. F. of L.); Screen Actors' Guild (A. F. of L.); American Guild of Musical Artists (A. F. of L.); International Brotherhood of Pulp, Sulphite & Paper Mill Workers (A. F. of L.); the Retail Hat & Furnishings Salesmen's Union (C. I. O.); National Maritime Union (C. I. O.); United Optical Workers Union (C. I. O.); Shoe Rebuilder & Orthopedic Workers Union (C. I. O.).

Policy. In establishing this Tribunal, the Association has adhered to its policy of limiting its operation to the practice of arbitration under contracts and to procedure under arbitration law, thus excluding it from the practice of mediation or conciliation. It believes that mediation or efforts at conciliation should be exhausted by the parties before arbitration is used. The Rules of Procedure allow for a more elastic proceeding. For example, an appeal is provided for and there is considerably more latitude in the taking of proofs. One of its outstanding policies is observance of the functions of existing official mediation boards; the Tribunal takes no initiative in the settlement of controversies, but acts only upon the request of both parties who voluntarily and upon their own initiative bring their controversy to the Tribunal.

Advisory Opinions. The Tribunal has, in one useful respect, gone beyond its self-imposed limit of arbitration under arbitration law. At this stage of development, many parties who desire to have a controversy settled do not desire a legally binding award; they are opposed to what they call compulsory arbitration and are unwilling to bind themselves to arbitration before a controversy arises. They prefer an inquiry or verification of facts or other service that will help in the adjustment. By reason of the increasing frequency of these requests and because the Tribunal is an agency for public service, advisory opinions are rendered in such matters. These opinions are not binding upon the parties, but are in the nature of certifications of facts or recommendations, the acceptance of which is discretionary with the parties.

GENERAL ARBITRATION SERVICES

In addition to maintaining tribunals of its own for the arbitration of domestic, foreign and inter-American controversies, the Association offers a number of arbitration services.

Trade Associations. With many of its affiliated trade associations, the Association has undertaken to furnish arbitrators when they are needed, to keep their arbitral machinery in order, to supply information or clerical and administrative services, or to set up special panels of arbitrators within an industry. Such industrial groups frequently use arbitration clauses referring to the Rules of the American Arbitration Association, under which arbitrations are held at the headquarters of the trade association if they so prefer. Through these services, the standards of arbitration have been raised and its practice made more uniform.

Chambers of Commerce. The Association has a service arrangement with a number of chambers of commerce, either for the use of their facilities for arbitration by the American Arbitration Tribunal or to furnish them with rules, panels or other facilities for their own arbitrations.

London-New York Service. In January, 1932, the American Arbitration Association and the American Chamber of Commerce in London established a joint service available to any parties arbitrating under the foreign trade clause of the Ameri-

can Arbitration Association or by submission. Under this arrangement arbitrations in the United States are held under the Rules of the Association and under the prevailing arbitration law; arbitrations held in London are under the Rules of the American Chamber of Commerce and under the British Arbitration Law. It has not been possible in the lean years following the establishment of this service to carry on the educational work to facilitate its use, but it is outstanding as an available service.

Municipal and City Court Service. In 1933, the Association established a special service for the settlement of personal injury and property damage claims, or tort cases, pending in the Municipal and City Courts of New York City. Through cooperative arrangements with the Justices, these cases are arbitrated in the American Arbitration Tribunal, under either Municipal or City Court Rules, whenever the parties are willing to refer them to arbitration under these Rules. As insurance companies are usually the defendants, cases are referred each month by arrangements with these companies, and the Association then undertakes to obtain the consent of the claimants or their attorneys. Upon such consent being granted, the case is arbitrated by a lawyer chosen from a special panel of lawyers set up for this purpose. A separate department is maintained for such arbitrations.

Membership Services. As the Association is a membership corporation, the question is sometimes asked whether a member, when he becomes a party to an arbitration proceeding, is entitled to special privileges or services not accorded to non-member parties. First, all Tribunals are operated as an administrative service under an Arbitration Committee and separate from all other functions of the Association. These Tribunals are open on precisely the same terms to all parties, irrespective of membership in the Association. Second, arbitrators are not informed about parties who are to appear before them and they do not know whether or not the parties are members of the Association. All parties are subject to the same rules, fees and other regulations on a basis of absolute equality. Third, the arbitration clause of the Association can be carried in any contract free of charge without regard to membership, and membership is not necessary for the use of the Tribunal.

Service to members entitles them to the free use of tribunals up to the amount of their dues, this amount being deductible from the fees established under the Rules. Members also receive the literature of the Association and participate in its activities.

RESEARCH AND EDUCATION

One of the primary functions of the Association is to carry on research and educational work in the fields of commercial and industrial arbitration, to create a science of arbitration, to improve its methods and, in general, to promote amity and goodwill through the knowledge and use of arbitration.

American Arbitration Law. A comprehensive survey has been made of American arbitration law, including common and statutory law, and of the leading decisions interpreting these laws. The results have been embodied in two publications issued by the American Arbitration Association: *The Code of Arbitration Practice and Procedure,* and *Suggestions for the Practice of Commercial Arbitration.*

Foreign Arbitration Law. The Association has translated and has had published in the United States a survey of foreign law which appears under the title of the *International Year Book on Civil and Commercial Arbitration.* It covers the countries of Austria, Belgium, Czechoslovakia, England, France, Germany, Greece, Italy, The Netherlands, Palestine, Poland, Russia, Scotland and the United States. Three further volumes, covering the countries of Bulgaria, Denmark, Esthonia, Finland, Hungary, Latvia, Luxembourg, Norway, Portugal, Roumania, Serbia (Yugoslavia), Spain, Sweden, Switzerland and Turkey, have been partly translated and are ready for editing.

In collaboration with the International Chamber of Commerce, studies of arbitration practice in Belgium, France, England, Germany, Italy, The Netherlands and Switzerland have been published in separate brochures. Distribution of these in the United States has been chiefly through the educational department of the Association.

Arbitration Law in American Republics. In collaboration with the Pan American Union a study has been made of arbitration law in the 21 American Republics and the findings were published by the Pan American Union in 1931. This study was

used as the basis for the organization of the Inter-American Commercial Arbitration Commission. A committee of lawyers, familiar with Latin-American law and practice, acts in an advisory capacity to the Commission.

State Surveys. The Association began a series of state surveys, intended to portray the origin, history and present status of arbitration in each important industrial state. These surveys were made in collaboration with state educational institutions, through appropriations made by the Association. The states in which surveys were completed were California, Connecticut, Maryland, Massachusetts, New Jersey, Ohio, Oregon, Pennsylvania, Texas, Virginia and Washington. The surveys in California, Connecticut, Ohio and Pennsylvania were influential in the enactment of modern arbitration statutes. Surveys planned for other states were necessarily suspended during the business depression.

American Trade Practice. A comprehensive survey was made of the practice of arbitration in trade, commercial and professional organizations. This inquiry covered more than 2,000 organizations and the results indicated that approximately 500 of them provided facilities or were interested in the use of arbitration. The results of this inquiry appear in the *American Arbitration Year Book* published in 1927.

Instruction. An inquiry concerning instruction in arbitration was made in the law and business schools in the United States and in departments of history, of international relations and of education which were likely to be interested in the subject. In most instances, commercial arbitration was confused with labor adjustments or political controversies, and rarely had any true arbitration instruction been given. In some instances it was pointed out to the Association that until the data was organized for instruction purposes not much progress could be made. The Association prepared a syllabus to aid in such instruction and, as noted above, has prepared suitable textbooks. Addresses have also been given in high schools and other educational institutions in New York City, reaching thousands of students.

Information Service. From the beginning of its work the Association has carried on the research necessary to the maintenance of a technical information service. This covers arbitra-

tion laws, court decisions and procedure and the practice in industrial organizations and in international trade. A most important part of this service is the series of 27 forms for arbitration procedure, available to any persons desiring to arbitrate, and a pamphlet entitled *The American Arbitrator and His Office,* which is a guide for arbitrators. The Association has sponsored a number of trade analyses which have been useful in improving arbitration facilities and their administration in trade groups.

Bibliographies. Not the least of its educational work has been the preparation of a *Bibliography on Commercial Arbitration.* This appears to be the only complete and available bibliography for students, teachers or others interested in the subject.

Public Meetings. Another method of education is through conferences and public meetings. A number of these are held each year. Among the guest speakers at the public luncheons held by the Association have been: the Hon. Joseph P. Kennedy, first Chairman of the Securities and Exchange Commission; George L. Berry, Coordinator for Industrial Cooperation; A. D. Whiteside, Malcolm Muir, S. Clay Williams and Pierre S. du Pont, at the time of their connection with the N. R. A.; the late Walker D. Hines, first President of the Cotton-Textile Institute; Hon. Spruille Braden, United States Ambassador to Colombia; Admiral Richard E. Byrd; William H. Coverdale, President, Canada National Steamship Lines; Hon. F. Trubee Davison, President, American Museum of Natural History; Hon. Harry F. Guggenheim, former Ambassador to Cuba; Charles M. Schwab, Chairman of the Board, Bethlehem Steel Corporation; Juan T. Trippe, President, Pan American Airways; George S. Van Schaick, former Superintendent of Insurance of the state of New York, and Louis H. Pink, the present Superintendent, and Thomas J. Watson, President, International Business Machines Corporation.

Education of the Bar. Unquestionably, the most important work undertaken has been the education of members of the Bar in the practice of arbitration. For the purpose of initiating this work, the Association appointed as a Special Committee of Lawyers the following: Charles C. Burlingham, John Kirkland Clark, Alfred A. Cook, John W. Davis, Kenneth Dayton, Stanleigh P. Friedman, Chauncey B. Garver, Edward S. Greenbaum, John G. Jackson, George W. Martin, George Z. Medalie, John Reynolds, Ralph S. Rounds and Kenneth M. Spence. This Com-

mittee has been instrumental in having Arbitration Committees appointed by the Bar Associations of New York City and in persuading lawyers to practice arbitration.

The Association of the Bar of the City of New York, through its Arbitration Committee, has sponsored necessary amendments to the New York Arbitration Law, carried on extensive educational work among its members, set up a panel of arbitrators and cooperated with other bar groups and the courts in the coordination of the arbitration activities of lawyers.

The New York County Lawyers' Association, through its Arbitration Committee, has carried on extensive educational work and research in the practice of arbitration by its members and the extent of instruction being given in schools and colleges on the subject, and, by means of a recent questionnaire, initiated among its members a movement for the use of arbitration clauses in labor agreements.

The committees of the two Associations above mentioned and those of the Brooklyn Bar Association, Bronx Bar Association and the Queens County Bar Association, recently cooperated with the Hon. Pelham St. George Bissell, President Justice of the Municipal Court of the City of New York, in coordinating the activities of the various arbitration committees and Municipal Court committees of the several lawyers' associations in New York City and in encouraging lawyers to arbitrate their pending cases, and in other ways to relieve court congestion through the use of arbitration.

Legislation. The Association does not engage directly in any legislative activities or in the promotion of legislation nor does it employ any persons for this purpose. It has, however, prepared a standard arbitration law called the Draft Act. This embodies the principles enacted into law by Congress and the legislature of the State of New York. It is furnished to bar associations, trade organizations, chambers of commerce or other local agencies interested in the improvement of laws within their states.

Medals for Distinguished Service. For a number of years, this Association has awarded a medal for distinguished service in the field of commercial peace to men who have rendered pioneer or signal service in advancing arbitration, either prac-

tically or through education. It has been bestowed upon Harry F. Guggenheim, Charles M. Schwab, Admiral Richard E. Byrd, Frederick Brown, Thomas J. Watson, Frank Gillmore and Juan T. Trippe.

In 1938, as the Association had entered the field of industrial arbitration, the Board of Directors authorized the bestowal of a medal for distinguished service in the field of industrial peace, the recipient for 1938 being Edward F. McGrady, former Assistant Secretary of Labor and now Vice President of the Radio Corporation of America and director of its labor relations.

General Publications. Perhaps the greatest problem that faced the new Association was the absence of any reliable or organized knowledge on the subject of arbitration with which it could proceed immediately and intelligently with the task of making arbitration more generally known and used in the United States. The first four years, therefore, were devoted, not only to conducting arbitrations and coordinating existing machinery, but to the creation of arbitration literature. The first legal textbook, since 1860—*Commercial Arbitrations and Awards*—was the contribution of Wesley A. Sturges, Professor of Law at Yale University. The first *Arbitration Year Book* was the contribution of the trade associations, wherein were recorded their activities. The first publication, in English, of a textbook on arbitration in foreign countries was the *International Year Book on Civil and Commercial Arbitration* by Dr. Arthur Nussbaum and his collaborators, translated and published by the Association. Brochures on the arbitration laws of different countries, published by the International Chamber of Commerce, were made possible by contributions from an American industry. The first *Code of Arbitration Practice and Procedure* was the contribution of the legal profession. Many other publications were made possible by special research funds.

These are the publications which have enabled the Association and other organizations to proceed intelligently with the development of arbitration. They constitute an indispensable foundation of knowledge and they absorbed a large part of the early financial contributions to the Association.

In 1937, the Association found itself in a position to undertake the publication of a quarterly ARBITRATION JOURNAL, thus adding current events and discussions to its more technical publications.

Standards. Perhaps the greatest contribution which the Association makes through its research and educational work is the establishment of standards, not only for itself but for arbitration generally. In this way policies, principles and practice are determined and established. These standards extend to arbitration law, rules of procedure, clauses in contracts, selection and qualifications of arbitrators,[4] administrative and ministerial services, setting up of tribunals, and other matters relating to arbitration. For example, the Association, through its legal research department and in collaboration with the Chamber of Commerce of the State of New York, has appeared as *amicus curiae* in a number of cases with a view to having sound legal principles established by the court.

SCIENCE OF ARBITRATION

Organized Arbitration. The Association believes, in this age of speed and high pressure and complexity of industrial and commercial life, that arbitration to be useful must be organized. This does not mean it is to become rigid and legalistic; but that it must have established principles, policies and practices, that it must be systematized and that it must be administered by sponsoring organizations; for it is beyond the competence of casual parties to arbitrations to conduct a correctly modern arbitration by themselves.

The ultimate objective of the Association is, through its acquired knowledge, and through the experimentation, research and practice in its tribunals, to advance both the idea and realization of a science of arbitration.

NEW SAFEGUARDS AGAINST OLD RISKS *

BY

GEORGE S. VAN SCHAICK

IT would be well if human society were so constituted that one could easily get that to which he is entitled. Unfortunately,

[4] *The American Arbitrator and His Office* provides such standards.

* Extensive excerpts from an address delivered by Mr. Van Schaick, former Superintendent of Insurance of the State of N. Y. and now Vice President of the N. Y. Life Insurance Co., at a meeting of the National Assn. of Insurance Commissioners at Des Moines, Iowa, on December 5, 1938.

disputed questions of fact and law and the machinery for their determination slow the judicial process and often make justice unduly expensive. Any effort at simplification makes universal appeal and is entitled to full and fair consideration.

Among the objects of the National Association of Insurance Commissioners is the recommending of ways and means of more fully protecting the interests of insurance policyholders of the various states. In conformity with that idea it has seemed appropriate at this meeting to speak of the use of arbitration as a new safeguard against old risks in the adjustment of insurance litigation and to urge a careful and exhaustive study of the question as one of the meritorious trends of the times, of special interest to the entire insurance field.

From the beginning of insurance supervision supervisory officials have watched adjustment practices of insurance companies with critical eye. They desire that policy claims be paid fully and promptly without quibble or reliance upon technicality. They quickly appraise the character of a company that is slow and niggardly in paying policy claims. Long ago they came to recognize the close relationship between unfair adjustment practices and financial instability, in that impending insolvency is nearly always presaged by delay and technical evasion in the payment of policy obligations.

The insurance company of high character and responsibility wants to pay its claims fully and fairly and takes pride in doing so with all reasonable speed. Carrying out the policy contract according to its plain intendment is the desire of most insurance companies. In the usual run of cases there is no deviation from this practice.

When, however, unusual circumstances arise, when facts underlying a claim are in dispute, when genuine questions arise as to the applicability of policy terms to unanticipated circumstances, a different question may be presented. Companies have no business to dissipate company funds on worthless or ill-founded demands. Premium should not be placed on exaggeration. Fraud should not be encouraged. Capable managements often use fine discriminating common sense in differentiating between the claims which should or should not be disputed. But when dispute is inevitable it is only fair to recognize that the

company has, in litigation, the advantage of endurance far in excess of the endurance of the usual policyholder.

Since 1934 an unusually interesting experiment has been worked out which would place litigating policyholders and insurance companies more on an equality and expedite final adjudications. This has been done with the cooperation of a large group of liability companies in agreeing to submit certain "run-of-the-mill" personal injury cases to arbitration through the facilities offered by the American Arbitration Association located in New York. During the period from October 1933 to November 1938 44 insurance companies have participated in the arbitration plan by the submission of pending court cases to arbitration. A total of 6,851 cases have been submitted. Of this number 3,767 have been adjudicated, 1,089 by awards of arbitrators and 2,678 through settlements after arbitration proceedings were instituted. In 2,739 cases the plaintiffs refused to consent to arbitration and such cases have remained on the court calendars. The problem has always been to obtain the consent of the plaintiffs or their attorneys, who, by reason of the meager knowledge of the general public, are reluctant to lose what they deem to be the benefits or advantages of court procedure. The percentage of consents is steadily rising, however, due to the educational work being carried on by the Bench, the Bar and the insurance companies.

A study of the results which have been obtained would be apt to lead anyone to the conclusion that this has been a wholesome experiment for policyholders and companies alike. Anyone familiar with the waste, both in time and money, in litigations conducted through ordinary court procedure involving small amounts knows instantly why small claims courts and the like will, in time, be largely extended. Anyone who has seen the subject matter of legal controversy consumed in costly litigation will appreciate the need of simpler, less costly machinery for the rendering of judicial decisions. In the insurance field the legal expense incident to litigation is a serious financial drain upon many companies. Furthermore, protracted litigation and adjustment delay are proficient destroyers of good will, a great asset of any insurance company.

In the December issue of *Fortune* magazine is a thrilling article on the growth of commercial arbitration and its extension to various fields in less than two decades. It gives a graphic picture of the public service of the American Arbitration Associ-

ation in advancing the cause of arbitration and furnishing the facilities and machinery for the conduct of arbitrations at nominal fees.

The article sets forth a fundamental philosophy that not one case in a thousand needs for its determination anything more elaborate, flexible or precise than "a little plain horse sense from somebody with a knowledge of the subject and no personal bias. This in a word is arbitration".

In studying ways and means of more fully protecting the interests of insurance policyholders of the various states and in developing interest in progressive movements to this end, I would commend the study of arbitration in the entire insurance field and the facilities now offered to the end that a tremendous economy might be effected, goodwill between companies and policyholders developed and prompt adjudications of litigations had by the use of simple and informal procedure. By the use of such an instrumentality as arbitration there may be reached a more prompt and greater approximation to right and justice than is often the case under the more formal and expensive court procedure in contested litigations.

The germ of common sense which underlies the principles of arbitration may have a wider significance for insurance supervision than appears at first glance. For four years as an insurance supervisory official I stressed two things to company managements and company executives. One was the necessity of self-regulation of insurance if greater governmental control was to be avoided. The other was the need of thorough study and understanding of the modern problems of insurance by company executives and supervisory officials alike. Greater cooperative action was sought between government and insurance management. If the ideals and objectives of each are sound they are necessarily the same. The position was also taken that companies, through their officers and managements, as well as supervisory officials, need to study and understand, in the light of changed and changing conditions, the various questions of policy affecting them. There is no need for any hostility between government and insurance if each understands the other's viewpoint and if each keeps close to proper ideals and proper objectives.

Cutting the knot of formal procedure, as arbitration has done in litigation, will lead most likely to a better understanding

between government and business. At the same time the assembling of the best insurance thought of the world around the conference table at regular intervals will provide a record of facts and opinions and discussion lacking in the field of insurance today.

NOTES AND COMMENT

New York Building Congress Revises Panel. Following a meeting of the Arbitration Committee of the New York Building Congress, Inc., the panel of arbitrators of the Congress is being revised and brought up to date so that it will contain the names of men from every branch of the industry. The Arbitration Tribunal of the Congress has functioned since January 1924 in disposing of claims, controversies and differences arising out of contractual obligations or agreements in the New York construction industry.

The Arbitration Committee under whose direction the arbitration work of the Congress is carried on includes: John W. Pickworth, chairman; Justin McAghon, Wm. A. Payne, L. K. Comstock, Ernest Frederick Eidlitz, Max Foley, W. G. Luce, Thomas A. Murray, Roberts B. Thomas, O. C. Spurling, Frank Lord and Albert A. Volk.

Insurance Executive Urges Arbitration of Claims. Arbitration instead of litigation for the settlement of disputes in connection with claims made on liability insurance policies was advocated by George S. Van Schaick, Vice President of the New York Life Insurance Company and a Director of the American Arbitration Association in an address made on December 5, at the annual meeting of the National Aassociation of Insurance Commissioners.

Mr. Van Schaick, former Superintendent of Insurance of the State of New York, stated that "anyone who has seen the subject matter of legal controversy used up in costly litigation will appreciate the need of simpler, less costly machinery for the rendering of judicial decisions". Mr. Van Schaick's address, in part, appears on page 18 of this issue.

National Foreign Trade Convention Endorses Arbitration. Included in the final declaration adopted by the Twenty-Fifth

Annual National Foreign Trade Convention, which closed in New York on November 2, was the following reference to commercial arbitration:

> The system of commercial arbitration in foreign trade having made notable advances in Latin-America through the activities of the Inter-American Commercial Arbitration Commission and in Europe through the efforts of the International Chamber of Commerce, this Convention reiterates its endorsement of the principle and urges the inclusion of the standard clause in contracts involving foreign trade transactions.

One of the outstanding events of the Convention was a luncheon given in honor of James A. Farrell, Chairman of the National Foreign Trade Council, Inc., sponsored by the American Arbitration Association, Chamber of Commerce of the State of New York, The Merchants' Association of New York, National Council of American Importers and Traders and the Inter-American Commercial Arbitration Commission.

Speakers at the luncheon included: Myron C. Taylor, James W. Ross of Canada, George H. Davis, President of the Chamber of Commerce of the U. S.; Curt G. Pfeiffer, President of the Importers Council and James S. Carson, a director of the Arbitration Association.

Arbitration Association Elects New Directors. Two new members have recently been elected to the Board of Directors of the American Arbitration Association to fill existing vacancies. They are: William H. Coverdale of Coverdale & Colpitts, President, Canadian Steamship Lines and the American Export Lines, and other shipping and railway corporations, and James H. McGraw, Jr., President of the McGraw-Hill Publishing Company.

Arbitration and the Accountant. Seventy leading members of the accounting profession in New York City are members of the American Arbitration Association's Panel of Arbitrators, having enlisted to serve in cases in which the accountant's peculiar qualifications make him an essential member of a board of arbitrators or in which the parties wish to include an accountant as one of the arbitrators. Among those who have served as arbitrators during the last 18 months are:

Philip F. Alther, Paul E. Bacas, Alexander S. Banks, James Barr, Edward A. Benson, David Berdon, Arthur A. Brody, Ernest B. Cobb, William D. Cranstoun, Morton I. Davis, Allan Davies,

A. S. Fedde, Max Fink, William B. Franke, John Fraser, Maurice Goldberg, Irving Groothuis, John J. Helmus, Herman Herwood, Charles L. Hughes, F. H. Hurdman, Paul K. Knight, Martin Kortjohn, Sr., Michael Kurz, Meyer Kurz, E. W. Lovejoy, Fred L. Main, Charles E. Mather, Michael Peyser, Henry S. Puder, Alfred J. Stern and Peter C. Wiegand.

Approximately one-half of the accountants mentioned have served as arbitrators in cases submitted to the Voluntary Industrial Arbitration Tribunal, involving disputes between employers and employees. In such cases, the accountant has been found to possess qualifications which meet the ready approval of both sides in labor disputes.

Arbitration Recommended in Landlord-Tenant Disputes in Iowa. The Agricultural Experiment Station recently undertook in a series of treatises to study the problem of farm tenure in Iowa and to have special committees appointed in order to make suggestions as to an improvement of the landlord-tenant relationship.

A few months ago the fifth study of the series was published under the title "Some Legal Aspects of Landlord-Tenant Relationships", and was prepared by Marshall Harris of the Division of Land Economics, Albert H. Cotton of the Farm Security Division of the Office of the Solicitor and Rainer Schickele, the Land Use Planning Specialist for Iowa. The report calls attention to the present unsatisfactory status of the law of landlord and tenant in Iowa, one of its evils needing correction by legislation being the vast amount of long-lasting and expensive litigation. Reference is made in this connection to the report of the President's Committee on Farm Tenancy of February 1937, in which the Federal Government recommended that the various states establish local boards of arbitration for landlord and tenant differences "composed of reasonable representatives of both landlords and tenants, whose decisions shall be subject to court review when considerable sums of money or problems of legal interpretation are involved". Following this suggestion, the authors of the report on legal aspects strongly recommend that such special arbitration boards for landlord-tenant disputes be established. Say the authors:

> It may be worth while considering the enactment of a statute to meet the special requirement for arbitration between agricultural landlord and tenant. Such a statute might provide that questions in dispute

must be submitted to arbitration before they are carried to courts, and the courts' consideration could not be limited to questions of statutory interpretation and constitutional rights. In other fields, such as workmen's compensation claims and insurance adjustments, such a preliminary submission of disputes to arbitration has been required, with the result that the necessity for litigation has been largely eliminated.

The statute could provide for the selection and certification in each county of qualified arbitrators who are familiar with state law and customary leasing procedure. These arbitrators would soon become experts in assisting landlords and tenants in their problems. They would have at their command information regarding rates of deterioration and the value of different types of improvements, particularly limestone, fertilizers and legumes. Through experience they would become familiar with the settlement of questions involving termination of tenancies, removal of fixtures and improvements and the making of repairs. The two parties could select their arbitrators from among those certified. They might soon find that their problem could be adjusted before a single arbitrator in whom both parties have confidence. This would further reduce costs and shorten the time involved. The arbitration process may become commonly used as an amicable way of arriving at decisions, thus preventing disputes and ill-feeling and greatly increasing the security and stability of landlord and tenant relationships.

COMMERCIAL ARBITRATION AWARDS

Underwriter and Insured: Public Liability. One afternoon a high-school boy brought his new Remington rifle to a store operated by a chain-store owner in an up-state village of New York and proudly displayed the rifle to some of the employees. Three of them, including the store manager, went to the basement of the store to amuse themselves with some target practice. The target was nailed to a door opening upon the street and each of them fired at least one shot at the target. One of the shots penetrated the door and struck and killed a man who was passing the building.

An action was started against the owner of the store by the widow of the victim. The owner carried a public liability policy and called upon the insurance company to defend the suit. The company refused, on the ground that the action was not one within the terms of the policy. The owner thereupon retained a local attorney to represent him in the trial, and the case had many vicissitudes before it finally reached the Court of Appeals, where a decision of the lower court in favor of the plaintiff in the amount of $50,000 was reversed and the claim dismissed.

During the course of the litigation the owner, feeling the need of more expert legal knowledge and tactics, retained a firm of New York lawyers for the defense and received from them a bill for $5,200, plus disbursements, when the case was concluded. The owner then made a claim upon the insurance company for the expense to which he had been put in defending the action, which burden he still maintained the company was required to assume.

The owner and the insurance company agreed that the question of the liability of the insurer to the insured should be determined by submitting an agreed statement of facts to the Appellate Division of the Supreme Court, but still found themselves in dispute as to the propriety of the owner's act in retaining the New York firm of lawyers and also as to the reasonable value of the services the firm had rendered. To settle these controversies, both parties agreed to submit to the American Arbitration Tribunal the following questions: (1) Whether it was reasonable for the owner to retain the second law firm; (2) if so, whether the firm's legal services were of the reasonable value of $5,200 and, if not, what the reasonable value was; and (3) whether certain disbursements of the law firm, aggregating $233, were reasonable.

The arbitrator selected from the panel was a prominent New York lawyer and his award on the three points was as follows: (1) It was reasonable for the owner to retain the lawyers in question in the defense of the action; (2) the reasonable value of the legal services rendered was $3,500; (3) the disbursements aggregating $233 were reasonably so charged.

With these controversies determined, the owner and the company were free to take to the Appellate Division the sole question of the company's liability under the terms of the policy in effect.

Assured and Beneficiary: Ownership of Equity in Policy. On September 18, 1921, the company issued a life insurance policy to the assured, the premiums to be paid annually. On February 23, 1923, there was a change of beneficiary, at which time the substituted beneficiary claimed the assured assigned and delivered to her the policy in question and that she paid all subsequent premiums.

On September 18, 1935, the policy lapsed by reason of nonpayment of premium and, in accordance with its terms, there

then became available automatic extended insurance, which the company had no right to cancel in order to make a payment of the cash value of the policy (and thus terminate all insurance) unless and until it received an agreement signed by both the beneficiary and the insured.

A dispute thereupon ensued, in which the company was what might be termed an innocent bystander. The beneficiary claimed to be the owner of the equity of redemption or the cash surrender value of the policy—a claim which the assured disputed and blocked by his refusal to execute the required surrender of the policy. The beneficiary thereupon started legal proceedings, naming both the company and the assured as defendants. At the suggestion of the company an agreement was later reached to submit the matter to the American Arbitration Tribunal, and an arbitration proceeding was arranged accordingly, with a lawyer acting as sole arbitrator.

In addition to signing an agreement to arbitrate the dispute and to be bound by the arbitrator's award, the parties also signed a stipulation agreement to surrender to the company the policy in question, for its cash surrender value, and to execute an agreement accordingly to be prepared by the company; with the further agreement that the company should pay to the American Arbitration Association the cash surrender value of the policy, to be disbursed in accordance with the decision of the arbitrator.

Only one hearing was required, after which the arbitrator awarded the assured a sum representing the total of two premiums paid by him, and awarded the balance of the cash surrender value of the policy of insurance to the beneficiary. Upon receipt by the company of the agreements signed by the assured and the beneficiary, in accordance with their stipulation, a check was forwarded by the company to the American Arbitration Association and disbursed in accordance with the award of the arbitrator.

AMERICAN INDUSTRIAL ARBITRATION*

A SUCCESSFUL APPLICATION OF CIVIL PRACTICE TO LABOR RELATIONS

BY

HARRY UVILLER †

THE whole subject of a peaceful and orderly relationship between capital-management and labor and its importance to a stable, democratic form of government is so generally misunderstood and confused with the rights of labor and those of capital that I welcome the opportunity to present, in the pages of THE JOURNAL, an illustration of a successful application of civil practice to labor problems.

Although, side by side with the more sensational news of strikes and labor disturbances, there have existed numerous instances of a civilized approach in all matters affecting the relationship between employer and employee, nevertheless, the general public is under the impression that the American system—law-making bodies to legislate for the good of all, courts to interpret the laws and determine rights and obligations and an administrative agency to enforce and carry out the will of the other two branches—cannot apply to industry. The attitude seems to be that we are exploring uncharted regions where labor controversies are involved and that lawful procedure cannot be

* Court decisions relating to industrial arbitration will be found in the section on Arbitration Law, beginning on p. 83, references to industrial arbitration in foreign countries will be found in the section on International and Foreign Arbitration, p. 56.

† Impartial Chairman-Administrator of the Dress Industry in the Metropolitan District of New York.

established concerning such matters. An important and, perhaps, large group believes that because "inalienable rights" are involved in labor disputes, the public interest must be subordinated to the so-called "private rights" of the parties and that the machinery of negotiation, mediation and arbitration must be replaced by a struggle to the finish between the disputants.

Despite popular belief, most controversies between labor and management do not cause "trouble" nor are they resolved by strikes. Most of the difficult situations in the relationship between capital and labor arise out of the issues of union recognition and the setting forth of mutual rights and obligations in contract form. Once these steps have been achieved, the procedure for the maintenance of uninterrupted production is as simple as the operation of our law courts, without the delays and technicalities usually associated with those institutions.

Fortunately, there is a powerful and growing determination among enlightened industrialists and union leaders to follow civilized methods in the settlement of industrial disputes, rather than to adopt the short-sighted view that such disputes constitute "private labor quarrels". Steady progress has been made by many industries, large, medium and small, in the direction of meeting intelligently the unavoidable and necessary development of labor consciousness in a true American way. The employers in such industries have accepted trade unions as an important factor in our national economy; they know that so long as unions are compelled to think in terms of survival they will continue to be warlike organizations with warlike points of view and tactics; they have learned from experience that the "class struggle" philosophy of the worker cannot be eliminated by compelling him to continue the fight for recognition and representation in industry; they have dealt with workers organized into *bona-fide* unions and have given such organizations full and complete recognition by either granting "closed shop" or "preferential shop" agreements; they have negotiated and signed collective agreements with unions, setting forth working conditions and standards governing both employer and employee; they have provided for an effective, joint investigating and adjustment machinery to handle and dispose of disputes and grievances realistically; they have set up industrial courts of arbitration to adjudicate finally such matters as they cannot satisfactorily settle by themselves.

The unions in such industries, on the other hand, have cooperated in a responsible fashion for the welfare of all engaged in them. As a result, a reasonably smooth and equitable relationship has been created between management and labor. The mutual faith and good feeling engendered during contract periods have been vital factors in the renewal of the agreements, at their expiration, around the conference table rather than on the battlefield.

The American Arbitration Association itself has recently recognized the trend and, accordingly, is attempting to introduce the same attitude and procedure with reference to labor matters as it has so successfully done in ordinary business controversies which would be termed "law suits" but for its intervention.

I have the honor of being the Impartial Chairman in one of those enlightened industries which has contributed much to voluntary self-government in industry. The steps taken by the manufacturers and the Union have been so simple, the approach so natural, from a business standpoint, and the acceptance so complete that one wonders how labor matters can be handled and disagreements resolved in any other way. I refer to the dress industry in the metropolitan district of New York, in which 2,500 firms do an annual business of five hundred million dollars and employ approximately 100,000 workers. There are three manufacturers' and jobbers' associations: The Affiliated Dress Manufacturers, Inc.; The National Dress Manufacturers' Association, Inc.; The Popular Priced Dress Manufacturers' Group, Inc.; a contractors' association: The United Association of Dress Manufacturers, Inc., and the Joint Board of the Dress & Waistmakers' Union (affiliated with the International Ladies Garment Workers' Union), the workers' organization.

The workers are employed directly by the contractors and manufacturers. The former supplement the production of the latter's own shops and produce all the garments that the jobbers handle from material and styles furnished by both. Collective negotiations among all the factors have resulted in agreements between the Union and each of the Associations and between the contractors' Association and each of the other organizations. Therein the parties have attempted to set forth in detail the rights, duties and obligations of their respective members and the conditions of employment, namely, methods of payment

(time or piece), hours of labor, tenure, manner-of-work distribution, methods for the fixing of piece rates, etc.

To keep the peace and avoid waste and bitterness through interruptions of production in the event of a difference of opinion, as well as to provide for a speedy, inexpensive, practical and less formal way of resolving their differences, a complete and adequate adjustment machinery was set up. In accordance therewith, all complaints, disputes or grievances involving the interpretation or application of any clause in the agreement or any acts, conduct or relations between the parties or their respective members, directly or indirectly, must be submitted by the aggrieved party to the other and an adjustment by the respective representatives attempted. Should they fail to agree, the matter must be submitted to the Impartial Chairman whose decision shall be final and binding. The parties undertake that there shall be no strikes, stoppages, lock-outs or cessation of work of any nature pending or after the determination of any complaint or claim for any reason whatsoever, except in instances specifically prescribed. Should a strike, stoppage or lock-out occur, all the factors immediately and sincerely co-operate with the Impartial Chairman's office so that work may be resumed without delay. Measures for the disciplining of violators of this most important clause are contained in the agreement and such corrective steps are taken to discourage recurrences.

The accomplishments and the value of the machinery set up in the dress industry may be partially appreciated from the following information: From March 17, 1936, to June 30, 1938, 5,268 cases were scheduled for hearing before the Impartial Chairman, of which 5,113 were disposed of, leaving 155 pending as of the latter date. Disputes which arose out of alleged violations of the contracts between the parties included, among others, such matters as: monies due, registrations, distribution of work, social security taxes, piece rates, minimum wages, discharges, membership problems and non-compliance. All of the 5,113 cases were not tried, thanks to the co-operation of the executive directors of the Associations and the general manager of the Union and their staffs; only 1,425 resulted in decisions; the others were settled by the parties before, during or after trial. Piece rates were fixed on 359,343 individual styles, only 7 per cent of which were referred to impartial adjusters; the remainder were settled by the committees and representatives

of the organizations heretofore mentioned; only 8 per cent of the prices settled by impartial adjusters were brought for review.

The pattern adopted for the proper handling of all labor controversies and matters incidental to and necessarily a part of production, closely follows the system practiced by our Government with which our citizens are so familiar: legislation through collective agreements, judicial functions through the impartial machinery and enforcement through the organizations participating.

Although the reader may be familiar with arbitration procedure, it may be of value to mention the outstanding procedural steps and underlying principles involved in the hundreds of cases which have been presented for adjudication to the Industrial Court of the Dress Industry. At this point, permit me to repeat that it is most essential to remember that such a tribunal, to be effective, must be voluntarily created and not imposed by law.

An action is commenced by one of the organizations, on behalf of its member or itself, filing a complaint with another organization, with which it has a contract, charging a violation. The claim is jointly investigated and an attempt is made by the parties to adjust the matter. Should they fail, notice of the disagreement is sent to the office of the Impartial Chairman. A hearing is then scheduled, the case is put on the calendar and both organizations are advised to be present with their principals and witnesses. No pleadings are required, but may be submitted to clarify or narrow the issues.

The submission is the complaint and the contract subsisting between the parties. The general basis for the action are the rights and obligations as set forth in the written agreement between them. The complaint, the notice of hearing and the decision or award constitute the only formal record, although minutes are taken in some important instances and when requested by either side. After the parties have presented themselves before the Impartial Chairman, the proceedings are sufficiently formal, with respect to rules of procedure and evidence, to expedite the trial and to maintain the dignity and prestige of the office; and informal enough to permit of a full and complete disclosure of the facts, without the hindrance of technicalities. This is hardly an opportunity for either side to engage in forensic oratory and theatrical ability, which are so evident in our courts of law. The

principals and witnesses are at their ease and every effort is made to avoid the austere atmosphere and discomfort of the average law court.

In most cases the participants are not lawyers and are given great latitude in the presentation of their case. They are restrained only when their testimony is repetitious or obviously far afield. Litigants expect to submit their evidence in their own way and they are not prevented from doing so, consequently, the objection "irrelevant, immaterial and incompetent" is infrequently heard. Judicial notice extends beyond that ordinarily attributed to a judge on the bench because of the arbitrator's familiarity with the issues which he is to hear and determine. Since the arbitrator need not be over-protected and may be depended upon to separate reliable evidence from pure hearsay, the rule of best and secondary evidence is respected only insofar as weight is concerned. Such testimony is usually not admitted but, when it is, receives more careful scrutiny.

Much has been said and written concerning the operation of a judge's mind in reaching a judgment. The orthodox conception of thinking purely of abstract law; of hunting for a clue in past opinions and decisions and of following a discovery of a similar situation and principle down to the present or the recent past is, in a large degree, absent from the deliberations of arbitrators. Each case rests on its own merits and the outcome is not affected by precedent. In arriving at the final determination, the contracts between the parties are respected but not rigidly interpreted; flexibility, insofar as the language will permit, governs the ultimate award. Every consideration, not inconsistent with the written expression of the parties, is given to the welfare of the employer's business as a part of the industry and the needs and frailties of the workers involved. The general legal rules of interpretation and construction of contracts are not lost sight of, but neither is the effect of a decision upon the disputants or the industry as a whole overlooked or disregarded when the arbitrator is called upon to determine the intention of the parties from ambiguous, uncertain or contradictory language of the agreements.

All in all, it may be said that in industrial arbitration law is tempered with justice, modern realities and present-day needs.

A properly functioning government, with its laws, courts and enforcement agencies, is essential for the individual pursuit of

happiness. In industry, its counterpart is just as necessary to permit all engaged therein to devote themselves to the pursuit of prosperity and the earning of a livelihood. Some day students of labor problems will wonder why the results obtained in some industries, which have served as laboratories, have not been generally applied much sooner; why the same straight, clear thinking, usually engaged in with respect to other fields, has so long been absent in industrial relations. Perhaps the day is not so distant when representatives of capital and labor will no more think of conducting their affairs without voluntary courts of arbitration than they would expect society to function without its civil and criminal courts. When that time has arrived, the public will be protected from immeasurable waste, inconvenience and annoyance and will be assured that another vital phase of general social welfare has been dealt with in a manner befitting our democratic institutions.

SETTLEMENT OF LABOR DISPUTES UNDER TRADE AGREEMENTS

BY

THOMAS H. TONGUE *

COLLECTIVE bargaining is now required by the National Labor Relations Act and the several State Labor Relations Acts. It is also rapidly gaining acceptance voluntarily by realistic employers as a necessary technique in the administration of labor relations. Ordinarily this procedure leads to the negotiation of a collective bargaining agreement defining the terms which are to govern the employer-employee relationship. Most of these agreements contain provisions for the settlement of disputes which may arise relating to their interpretation and renewal.[1] For this purpose some form of negotiation or conciliation between the parties or

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[1] Twentieth Century Fund, *Labor and Government* (1935) 46; Magruder, *A Half Century of Legal Influence Upon the Development of Collective Bargaining* (1937), 50 Har. L. Rev. 1071 at 1113; Brown, *Company Agreements with Organized Labor*, Nt. Ind. Conf. Bd. Bull., v. 10, no. 8, p. 81 (Aug. 31, 1937). For a discussion of the legal status of trade agreements see Rice, *Collective Labor Agreements in American Law* (1930), 44 Har. L. Rev. 572.

their representatives is nearly always provided. Many contracts also provide that if such negotiations fail disputes may or must be submitted to arbitration. The resulting award may be made either final or merely advisory, according to the agreement. To date, however, comparatively few successful patterns of procedure for the settlement of labor disputes have been developed, and those which have been developed are as yet neither widely used nor generally understood.

Of all the procedure and plans for amicable administration of labor relations under collective agreements, those for conciliation and arbitration are most common. Such plans have been most extensively developed in the following industries: the coat and suit industry, the book and job industry and the building trades (all in New York City) and the bituminous coal industry in Illinois. The writer has made a study of the plans of these industries with a view of determining their elements of weakness and strength and with a view of ascertaining how readily such plans may be transferred to other industries.[2] In connection with this study consideration has also been given to the experience of certain single enterprises which were not associated in employers' associations for the purpose of collective bargaining[3] and also

[2] The railroad industry was also studied incidentally, although its development of conciliation and arbitration has been more immediately the result of legislation rather than the cooperative efforts of employers and employees, as in the other industries mentioned.

The following is a brief bibliography of general material: (1) Coat and suit industry: Levine, *The Women's Garment Workers* (1924); Cohen, *Law and Order in Industry* (1916). (2) Book and job printing industry: Bogardus, *Industrial Arbitration in the Book and Job Printing Industry in New York City* (1934); Brown, *Joint Industrial Control in the Book and Job Printing Industry*, U. S. Bur. of Lab. Stat. Bul. no. 481 (Dec. 1928). (3) Building trades: Hardman, *American Labor Dynamics* (1928) at 192. (4) Bituminous coal industry: Bloch, *Labor Agreements in Coal Mines* (1931); Scott, *The Coal Industry and Coal Miners' Unions in the United States Since the World War* (1931); Suffern, *Conciliation and Arbitration in the Coal Industry of America* (1915). (5) Railroad industry: Railway Labor Act, 48 Stat. 1197 (1934), 45 U. S. C. A. sec. 151 (Supp. 1937); First Annual Report of the National Mediation Board (1935). The provisions of present trade agreements in these industries were also studied.

[3] See *Recent Agreements Negotiated Between Company Managements and Labor Organizations*, Mem. 58 and 61, Nt. Ind. Conf. Bd. (1937); *Labor Union Agreements Analyzed*, Nt. Assn. of Mfrs., Lab. Rel. Bul. no. 20, (May 25, 1937); Brown, *supra* note 1.

to the plan of industrial arbitration recently developed by the American Arbitration Association.[4]

In the study of these programs special attention was paid to the following questions: (1) What general factors have influenced the development of the given plans of conciliation and arbitration? (2) What administrative machinery has been developed for the settlement of disputes? (3) What have been the results?

In this article it is impossible to review the facts and findings of the entire study. But a brief summary of the general conclusions will indicate what are considered to be some of the more practical and successful procedures for the settlement of industrial disputes.[5]

A. *General Factors Influencing the Development of Conciliation and Arbitration.*

Of course various general conditions of a single enterprise or industry are inevitably significant in the development of a successful plan for conciliation and arbitration. If there is widespread over-production or excessive competition exerting a pressure on wages and working conditions the problem will be aggravated.[6] Pronounced seasonal fluctuations in production and employment are another aggravation.[7] And where masses of unskilled workers are employed there are impediments to the development of a successful program not existing where there is a personnel of highly skilled workers.[8]

The nature and strength of the organizations of both workers and employers are also important factors. Negotiations are much more apt to be successful if both sides are organized and of equal bargaining strength. It is also significant to note that, at least in all of the four industries studied, successful conciliation and arbitration were possible only after the issue of union recognition had been settled and the closed shop established. Dis-

[4] *Voluntary Industrial Arbitration Tribunal* (1937) 1 ARB. J. 403.

[5] Mediation and arbitration by federal or state agencies will not be discussed in this article, as it constitutes a field for separate study.

[6] The bituminous coal industry is an outstanding example of this.

[7] This has been particularly true in the coat and suit industry and in the building trades.

[8] This was one reason why the development of a successful plan for conciliation and arbitration has been more difficult in the coat and suit and the bituminous coal industries than in the book and job printing industry and among the railroads.

putes over these questions are rarely subject to successful settlement by conciliation or arbitration.[9] If these fundamental questions remain at issue the acceptance of collective bargaining alone will seldom bring peaceful labor relations.[10]

The general attitude of the bargaining parties is also of extreme importance. If the employer or the union is hostile to conciliation and arbitration, or if the parties are unwilling to trust each other, no plan, however well devised theoretically, can succeed. If labor is fairly treated and its voice is honored in the determination of conditions of employment it is more apt to be reasonable and cooperative. Employers are more apt to take a reciprocal attitude when employees are not unreasonable in their requirements or violent in their attempts to enforce their demands. But for both parties to develop such an attitude, experience with collective bargaining has generally proved essential.[11]

Whatever the characteristics of the particular industry may be, a plan for conciliation and arbitration must be carefully adapted to them if it is to be successful. At least it has been demonstrated that a plan which has been successful in one industry cannot be transplanted to another industry of a different nature and with a different background of experience.

B. *The Development of Administrative Machinery for the Settlement of Disputes.*

1. *Disputes Arising in the Making or Renewal of Trade Agreements.* The negotiation of a trade agreement is a matter of bargaining. It will tend to reflect the relative strength of the parties more than any generic principles as to industrial relations or concepts of justice. Thus direct negotiation and conciliation must function at this point. They are the only methods by which each side will be satisfied that it is getting all that its bargaining position merits. By these processes of reaching an agreement the parties will have become reconciled to the concessions which each may have made to the other. Such methods of settlement, moreover, put the responsibility for the successful negotiation of agreements upon the parties themselves (where it belongs). They

[9] See *Governmental Protection of Labor's Right to Organize*, N. L. R. B. Bul., no. 1, p. 17 (Aug. 1936).

[10] See also Cohen, *op. cit. supra* note 2, at 151.

[11] In each of the industries studied there have been from twenty-five to fifty years of active experience with collective bargaining.

are most familiar with the problems involved and by them the agreement must later be translated and put into operation.[12]

But if such negotiation fails, and no mediator is available or able to aid the parties in reaching a workable trade agreement, arbitration, if possible, is, to say the least, to be preferred over direct action by strike or lock-out.[13] It is true that in such cases there is no "justiciable issue" involved, since there will be no standards or contract provisions to apply. But this alone should not prevent the use of arbitration.[14] It should be possible to limit and define the issues preventing an amicable closing of an agreement so that an experienced arbitrator may pass an intelligent judgment. Both in the book and job printing industry and among the railroads it has been demonstrated that this type of arbitration may be successful when other methods have failed.[15]

In such cases the arbitrator should generally be of temporary appointment for the settlement of the particular dispute only. His decision resolving disputes about substantive terms of the agreement is likely to prejudice him in the eyes of at least one of the parties, and thereby impair his usefulness as an arbitrator of disputes arising under the trade agreement as finally consummated by the arbitration.

2. *Disputes Arising Under Trade Agreements.* In the settlement of disputes arising out of the interpretation and application of trade agreements which have been successfully consummated, primary reliance should also be made upon direct negotiation and conciliation between the disputants. As first instance procedures they have been preferred over arbitration. Such was the choice in all of the industries studied.

[12] On the advantages of direct negotiation and conciliation see: Oliver, *The Arbitration of Labor Disputes* (1934), 83 U. of Pa. L. Rev. 206, at 210; Cummins, *The Labor Problem in the United States* (1932), 661; Selekman, *Postponing Strikes* (1927), 315.

[13] On the advantages of arbitration see: Kellor, *Arbitration in the New Industrial Society* (1934) 14; Witte, *The Government in Labor Disputes* (1932), 261; Oliver, *supra* note 12, at 221.

[14] For a discussion of this distinction and the legal status of industrial arbitration see Fraenkel, *The Legal Enforceability of Agreements to Arbitrate Labor Disputes* (1937), 1 ARB. J. 360.

[15] On the use of arbitration in making trade agreements in the book and job printing industry see Bogardus, *op. cit. supra* note 2, at 61-64. Under the Railway Labor Act if mediation fails in such cases arbitration is also provided. 48 Stat. 1197 (1934), 45 U. S. C. A., sec. 155 (1) (Supp. 1937).

The experience in these industries also shows that provisions in trade agreements for negotiation and conciliation are best if they make possible a series of opportunities for settlement, so that if a settlement fails in the first negotiations it may still be possible for the parties to get together.[16] Thus some or all of the following steps may be chosen: (1) Negotiation on all complaints first between the company foreman and the union shop representative; (2) Conference between the superintendent and the union shop committee or representative; (3) Reference to a joint committee appointed to consider the particular dispute; (4) Request to a federal or state conciliator to intervene and aid in reaching a settlement.

At any stage of these proceedings the representatives of the parties should have power to make a binding settlement, subject to the appellate recourse. It might also be advisable to empower the representatives at any stage to submit the dispute to arbitration. How elaborate the machinery should be depends upon the nature of the particular industry, its experience with collective bargaining, and the number of disputes ordinarily arising within it.[17] In any event there can be no error of over-providing opportunity for the outlet of friction before it assumes excessive proportions.[18]

Although the trend has been to subordinate arbitration as a means of settling disputes arising under collective agreements, its importance when conciliation fails should not go unemphasized. That it has a real function and should by no means be disregarded in any labor relations program is well shown by the fact that in the railroad industry, as the result of years of experience, arbitration is even required by law in some cases, even though mediation and conciliation are still relied upon as the primary means of settlement.[19] In the coat and suit industry, which probably has the most successful private organization for the settlement of labor disputes, there is but one intermediate step before disputes are referred to arbitration.[20] At least arbitration is the best method yet devised for the settlement of disputes under trade agreements when conciliation has failed.

[16] See *Labor Union Agreements Analyzed, supra* note 3, at 8.

[17] See Suffern, *op. cit. supra* note 2, at 198.

[18] See Levine, *op. cit. supra* note 2, at 312.

[19] 48 Stat. 1187 (1934), 45 U. S. C. A. sec. 153 (1) 1 (Supp. 1937).

[20] See Agreement of Ind. Council of Cloak, Suit & Skirt Mfg., Inc. with Int. L. G. W. Union, 1937-1940, p. 17.

But merely to provide that disputes in such cases shall be "arbitrated" is not enough. The organization and procedure must be definite and well-planned.

Most of the trade agreements studied provide for one or more temporary arbitrators, to be chosen as the occasion demands. But in the coat and suit industry, the building trades in New York for jurisdictional disputes, and the bituminous coal industry in Illinois, permanent arbitrators have been favored. The advantages claimed for temporary arbitrators are that they will be free from the charges of bias that may soon attach to permanent arbitrators and that direct negotiation is encouraged when responsibility cannot easily be shifted to an ever-available permanent arbitrator. On the other hand, there is often difficulty in agreeing upon an impartial and competent temporary arbitrator after disputes have arisen and the parties are antagonized. With this problem in mind it may be found that a permanent official, who knows the problems of the business or industry, may be superior.[21]

The plan proposed by the American Arbitration Association may be the best solution in many cases. Under this plan, if the parties fail to make a selection of arbitrators it is made by a committee of the Association from a list of names submitted to the parties for approval. There can be no deadlock and yet there would be no permanent arbitrator as an object of suspicion. It should also be possible to secure experienced and impartial arbitrators for any case from the panel of the Association.[22]

In consummating a trade agreement with arbitral procedures, the nature of the particular business and its experience with collective bargaining must also be carefully considered.

For small, single businesses permanent arbitrators would probably not be practical in any event. But to prevent deadlocks over the selection of temporary arbitrators, provision may well be desired that in such event the selection shall be made by some outside person or public official, or under the rules of an organization such as the American Arbitration Association.[23]

[21] On the relative advantages of temporary and permanent arbitrators see Cummins, *op. cit. supra* note 2, at 663.

[22] See *Voluntary Industrial Arbitration Tribunal, supra* note 4.

[23] See *id.* The rules of procedure adopted by the Association might also well be included by reference.

For larger enterprises with little experience with collective bargaining the same provisions will probably be equally advisable because in most cases the parties will not have developed sufficient confidence in the procedure to warrant a permanent arbitrator.[24]

In designing a plan for arbitration to be applied to an entire industry organized through employers' associations and unions, the size of the component establishments and the area to be covered by the plan are most important. In an industry composed of a large number of comparatively small units confined within a relatively small area, a permanent arbitrator with a permanent staff to assist in enforcement may prove to be the best solution. The coat and suit industry in New York is a fit example of the successful operation of such a plan.

In the case of large industries, composed of large units and covering an extensive area, it will be difficult for a single permanent arbitrator to function effectively. Unless a nation-wide organization should be developed and allocated to districts of a size and nature which could be handled by a permanent arbitrator, the problem may best be approached, perhaps, on the basis of the individual units involved, with a separate plan for each.[25]

3. *Provisions for the Enforcement of Trade Agreements.* Where the law of the state permits, the agreement should provide that the award of the arbitrator shall be binding and enforceable in the most expeditious way available.[26]

One of the most effective means of enforcement, though not practical in all instances, is by use of a permanent staff of investigators with power to inquire into alleged violations of trade agreements and awards and to examine books and records for this purpose. In the coat and suit industry this has been found to be very effective. Even though a permanent arbitrator may not be desirable, a permanent compliance staff may greatly aid in the enforcement of collective bargaining agreements in some cases.

[24] This is probably true even though there are frequent disputes and complex problems creating a situation which might best be handled by a permanent arbitrator, when from longer experience with collective bargaining more confidence in arbitration is gradually developed.

[25] In providing for arbitration in trade agreements consideration should also be given to the points outlined in *Arbitration Provisions in Labor Agreements* (1937) 1 ARB. J. 333. See also Oliver, *supra* note 12, at 221.

[26] On the enforceability of arbitration awards see Fraenkel, *supra* note 14.

Where both employers' associations and unions have been organized, it may be provided that each shall require its members to comply with the trade agreement. Fines or expulsion may be provided as penalties. This method has been found successful in the coat and suit industry and in the bituminous coal industry. Employers' associations have contributed frequently to the success of collective bargaining agreements by providing sanctions inducing their members to comply with them.[27] It may also be helpful to provide that the employers' association and the union shall maintain separate committees to receive and attempt to resolve complaints before joint negotiations are initiated.[28]

Regardless of the means adopted, enforcement must be recognized as a most important aspect of any plan for conciliation and arbitration. No plan can depend entirely upon the voluntary cooperation of the parties.

C. *General Results from Experience with Conciliation and Arbitration.*

In the case of trade agreements between independent business establishments and their employees there is no adequate information whereby the general success or failure of attempted plans for conciliation and arbitration can be judged. But in all of the general industries studied the results under their collective agreements have been satisfactory. Strikes were reduced in all cases and were almost eliminated in some. The establishment of uniform wages and other conditions of employment throughout the industries had a stabilizing effect and helped to eliminate unfair labor practices. In most cases the development of conciliation and arbitration has resulted also in more amicable relations between employers and employees.

Although the direct influence of conciliation and arbitration is not so clear, wages and working conditions have improved in all of the industries studied. At least under such plans there has been an opportunity for a truer reflection of the actual needs and grievances of the workers. At the same time they have derived

[27] This has been particularly true in the coat and suit industry and in the building trades in New York.

[28] Similar techniques were found to be successful by some regional boards under the N. I. R. A. and have also been adopted under the recent Wisconsin Labor Relations Act. See Garrison, *Government and Labor: The Latest Phase* (1937) 37 Col. L. Rev. 897.

a new sense of security in their jobs with the knowledge that they have an effective means of redress of grievances.

Employers favored the plans developed for conciliation and arbitration in each of the four industries studied. This support was not won by glittering ideals of humanity, but as the result of practical benefits after long experience and the realization not only that business can be successfully conducted under such plans, but also that trade agreements with adequate provisions for the settlement of disputes offer the most practical solution to many problems of labor relations. Although union support has not been so unanimous, in most cases unions also have favored the plans developed for conciliation and arbitration and at least now more frequently insist upon the inclusion in trade agreements of some provisions for the settlement of disputes by these principles.

It has been pointed out that there is no one type of plan for conciliation and arbitration that is universally applicable. But it has also been demonstrated by experience that some workable plan can be developed to fit the needs of an independent business establishment or of an industry. Even in the coat and suit industry, with sweat-shop conditions and almost every other possible obstacle at the outset, perhaps the most successful plan for conciliation and arbitration on an industrial basis has been developed. What has been done there can be done elsewhere.

By joint effort employers and employees can work out their own problems in a manner suitable to their own needs and thus reach a result far more satisfactory to both than would be likely under a system of governmental regulation. Further legislative regulation may be the only alternative, however, if business and labor cannot get together in the development of their own plans for the settlement of industrial disputes.

NOTES AND COMMENT

Railroad Deadlock Ended. Announcement was made on August 31 by the National Mediation Board of the failure of its efforts to settle a railway wage dispute by arbitration, following the Unions' rejection of arbitration after the railroads had agreed to the proposal. President Roosevelt thereupon appointed an Emergency Fact Finding Board, consisting of Chief Justice Walter P. Stacy, of the North Carolina Supreme Court; Dr.

Harry A. Mills, retiring Chairman of the Department of Economics, University of Chicago, and Dean James M. Landis of the Harvard Law School. Following a series of public hearings during which the railroads and the unions went exhaustively into the proposed $250,000,000 wage reduction, the Fact Finding Board presented the following conclusions:

> 1. The wages of railway labor are not high even as compared with wages in other comparable industries. 2. A horizontal reduction of wages on a national scale would not meet the financial emergency of the industry, since the savings would not be distributed merely to the needy roads. 3. A wage reduction in the railroad industry would run counter to the trend of wage rates in industry generally. 4. The financial distress of the carriers which has obtained since October, 1937, when the last wage increases were granted, is as yet a short-term situation. As such it cannot be regarded as grounds for a wage reduction, especially in view of present indications of an improvement in the business of the carriers. 5. In the light of these findings, the board concludes that the proposal of the carriers for a reduction of the wages of railway labor should not be pressed and recommends that the carriers withdraw and cancel the notices which would put such a reduction into operation as of Dec. 1, 1938.

Following the Board's recommendations, railway officials rescinded their plan to reduce wages on December 1 and set at rest the threat of a nation-wide strike of railway employees.

Arbitrators Named for Pacific Coast. The Secretary of Labor has appointed arbitrators to serve on the Pacific Coast under an agreement between the Waterfront Employers' Association of the Pacific Coast and the International Longshoremen's and Warehousemen's Union, C. I. O., which provides that all matters in dispute arising out of the contract shall be submitted to arbitrators appointed by the Secretary of Labor. Both sides are bound to accept the arbitrators' decisions and agree that no strikes or lock-outs shall be permitted as a result of any dispute submitted to arbitration.

The arbitrators named by the Secretary of Labor are Robert Littler of San Francisco; Samuel B. Weinstein, attorney, of Portland, Oregon; Irvin Stalmaster, Los Angeles and Frank C. Griffin, attorney, of Seattle, for their respective districts. The expenses of the arbitration are to be borne equally by the Association and the Union.

New Jersey Labor Relations Program. On December 8 a conference of mediation and conciliation agencies of the United States and Canada was held in Newark under the auspices of the Newark Labor Relations Board, of which L. Hamilton Garner is Director. Following an informal luncheon and discussion in the afternoon, the conference ended with a dinner meeting at which addresses were made by the Rev. John P. Boland, Chairman of the New York State Labor Relations Board, and William H. Davis, Chairman of the New York State Board of Mediation.

A suggestion has been made by the State Federation of Labor, New Jersey Unit of the A. F. of L., to the Legislative Commission, studying a labor relations program, that a labor judge be appointed by the Governor to serve for five years at an annual salary of $7,500. Under this proposal the judge would have statewide jurisdiction in handling charges of unfair labor practices and a three-member labor relations board would be created to determine collective bargaining agents by calling employee elections. The judge would hear appeals from the board's decisions.

Arbitration in Shoe Workers' Agreements. The United Shoe Workers of America, organized on March 16, 1937, have now signed twenty agreements with shoe manufacturers, covering 149 firms employing approximately 22,000 workers.

In addition to grievance machinery, some form of arbitration is provided in every one of the Union's agreements. Typically, these establish a committee of one or two representatives of each party to the agreement, this committee to choose an impartial chairman. In the event of inability to agree on a chairman, some agreements specify how he is to be chosen. Five enlist State labor boards or State boards of arbitration, while three agreements signed by 76 firms call upon the American Arbitration Association to select the impartial chairman. In two instances the impartial chairman is named. In two agreements, signed by 18 firms, the parties agree that the arbitration award may be enforced by court action in law or equity.

Almost all agreements provide that the decision of the arbitrators shall be binding on both parties. A time limit is placed on the arbitrators in several agreements. In one the arbitration must be concluded and findings made within one week after termination of the hearing and within two weeks after the com-

mencement of the hearing. One agreement specifies that the decision is retroactive to the inception of the complaint. Forty-six firms have agreed that the subject of the 40-hour week or the closed shop may not be taken to arbitration, nor may the "no strike" clause be arbitrated in another agreement.

During the procedure outlined above for the settlement of grievances, the union agrees that there will be no strike or stoppage and the employer agrees that there will be no lock-out.

British and Swedish Systems of Labor Relations Endorsed. General agreement that the British and Swedish systems of industrial self-regulation and of voluntary, rather than mandatory, cooperation between employers and employees would be feasible in this country was voiced by a number of leaders in the field of industrial relations in New York State, before a session of a legislative committee on labor relations meeting in Albany on November 29, under the chairmanship of Assemblyman Irving M. Ives.

The need of a proper mental attitude and a sympathetic understanding of each others problems on the part of management and labor was stressed by several speakers, including W. Ellison Chalmers, of the Department of Labor, and William H. Davis, Chairman of the State Board of Mediation, both of whom were members of President Roosevelt's fact-finding commission on labor relations in England and Sweden; Frank E. Gannett, Rochester publisher; the Rev. John P. Boland, Chairman of the State Labor Relations Board, and Frieda S. Miller, State Industrial Commissioner.

The particular advantage of a system under which representatives of industry-wide associations of employers and industry-wide, independent trade unions meet to discuss wages, hours and working conditions was stressed by several of the speakers, and Miss Miller pointed out, as a basic problem in the field of labor relations, the need for "growing up" and emphasized the fact that the State has the machinery for aiding in the growing up processes through various state boards which are educational agencies to help toward the goal of industrial peace.

Stereotypers Celebrate Forty Years of Industrial Peace. More than 1,500 members and guests of the New York Stereotypers' Union Local 1, an A. F. of L. affiliate, celebrating the organization's 75th

anniversary on November 20 in Brooklyn, were congratulated by Matthew Woll, Vice President of the Federation, on the Union's peaceful and progressive history.

Mr. Woll stressed the importance of peaceful relations between employers and employees and the settlement of disputes at the conference table, pointing out that in the entire history of the Local, there had not been violent friction between the employers and members of the Union in 40 years.

National Association of Manufacturers' Labor Program. Ending its Congress of American Industry on December 9, the National Association of Manufacturers adopted a program for American progress which contained the following reference to industrial relations:

> Industrial management recognizes that employees who wish to bargain collectively are entitled to do so, in whatever form they determine, through their own freely chosen representatives, and without intimidation or restraint from any source.
>
> The disturbed labor relations which have existed during the past few years are a major obstacle to recovery. Industry pledges its full cooperation in whatever changes may be necessary to correct these conditions.
>
> In order to promote mutually satisfactory labor relations which will increase production and provide more jobs, we urge employers to maintain a well-defined labor policy suitable to the conditions of the company, community and industry; to provide opportunity for free interchange of ideas between management and employees on all matters of common interest, adequate opportunity for prompt consideration and adjustment of complaints and fair wages for work performed, with incentives where they can be fairly applied as a reward for individual or group accomplishment; to maintain good working conditions.

State Agencies in the Field of Mediation and Conciliation. A study of state agencies in the field of mediation and conciliation, prepared by Alfred Acee, of the Bureau of Labor Statistics of the Department of Labor, reports that there are forty-three states, territories or possessions which have legislated on the subject of conciliation and arbitration of industrial disputes. In two states, however, (Nebraska and Wyoming) such provisions are contained in their Constitutions, but the legislatures have failed to enact laws to put them into effect.

There are four main classes of state agencies for the prevention and settlement of industrial disputes provided for by state

laws: (1) state boards for mediation, arbitration or inquiry, either permanent or working intermittenly; (2) *ad hoc* boards of arbitration, established for the settlement of a particular dispute; (3) local or county boards of arbitration licensed to serve for a definite period; (4) state departments of labor, industrial commissions or similar bodies.

The survey states that of the states and territories having laws authorizing intervention in industrial disputes, thirteen [1] provide for a state board, twenty-three [2] for *ad hoc* boards, twenty-three [3] for an industrial commission, department of labor or similar body, and five [4] for local or county boards. In a number of these states, the state agency may act only in important labor disputes and in some cases only when requested to intervene by one of the parties to the dispute. It will be noted that in a number of states provision is made for more than one agency.

Grievance Machinery in Recent Agreements. Labor Agreements recently signed by management and labor provide grievance machinery for workers in a wide variety of industries. Typical of these are the contracts between the following:

Fur Merchants Employers Council and the Fur Merchants Employees' Union, Local 64 of the International Fur Workers' Union (C. I. O.). The agreement, extending to September 30, 1940, provides for arbitration of all disputes, with strikes outlawed except for violation of impartial chairman's decisions.

Lehigh Portland Cement Company and United Cement Workers, Local 21045 (A. F. of L.). Agreement provides for monthly meetings of a committee of the Union and the local management. If disputes are not settled satisfactorily they are then carried to higher Company officials, with the assurance that there shall be

[1] Connecticut, Maine, Massachusetts, Michigan, Missouri, Montana, Nevada, New Hampshire, New York, Oklahoma, Oregon, Vermont and Wisconsin.

[2] Alaska, Arkansas, Colorado, Georgia, Indiana, Iowa, Kansas, Louisiana, Maryland, Michigan, Minnesota, Nevada, New Jersey, Ohio, Oregon, Pennsylvania, Philippines, Puerto Rico, Rhode Island, South Carolina, Texas, Washington and Wisconsin.

[3] Alabama, Arizona, Colorado, Georgia, Illinois, Indiana, Kentucky, Louisiana, Maryland, Minnesota, New Hampshire, Ohio, Pennsylvania, Philippines, Puerto Rico, Rhode Island, South Carolina, South Dakota, Texas, Utah, Washington, West Virginia and Wisconsin.

[4] Maine, Massachusetts, Montana, Ohio and Pennsylvania.

no lock-outs or strikes while the matter in dispute is being arbitrated.

Jesse C. Stewart Grocery Company (Pittsburgh) and United Grocery Employees Union No. 20541 (A. F. of L.). The agreement is the result of an award by Phillip Chappell, Commissioner of Conciliation of the U. S. Department of Labor. Wages, hours and conditions of employment are covered. Following upon the decision in this instance, other warehouses in this territory began signing agreements with employees on the same basis.

North Shore Line and Division 900, Amalgamated Association of Street and Electric Railway Employees of America (A. F. of L.). A temporary agreement provides for negotiations on wages, hours and working conditions to take effect at end of 90-day period. If after 30 days no agreement is reached, the question in dispute will be submitted to a board of arbitration.

American Merchant Marine Institute and the National Maritime Union (C. I. O.). Agreement covers wages and working conditions for 20,000 seamen and about 43 per cent of the industry, contains grievance clauses dealing with rights of employees and provides for arbitration of future disputes.

Packard Motor Car Company and United Automobile Workers of America, Local 190 (C. I. O.). Agreement provides machinery for settlment of grievances through shop or district stewards or grievance committees, pending which there is a ban on strikes and lock-outs.

Joseph Seagram & Sons, Inc., and Calvert Distilling Company and the several Distillery Workers Unions, affiliated with the A. F. of L. Agreement provides for grievance machinery, with final reference of unsettled disputes to the Director of Industrial Relations at Louisville, pending which there shall be no strikes or lock-outs.

Associated Men's Wear Retailers of New York and the Retail Hat & Furnishings Employees Union, Local 721 (C. I. O.). Agreement provides there shall be no strike or lock-out and that all disputes shall be arbitrated either by the State Board of Mediation or the Voluntary Industrial Arbitration Tribunal of the American Arbitration Association, at the option of the party initiating the proceeding.

Hotel Association of New York City and the New York Hotel Trades Council, representing six A. F. of L. unions. The agree-

ment, which runs to January 31, 1942 and covers 60,000 employees, provides for the establishment of minimum rates of pay, the union shop, the check-off system and the appointment of an impartial arbitrator.

Arbitration in Recent Strikes. Among the strikes recently terminated in which arbitration was used effectively or which resulted in labor contracts providing for arbitration, were the following:

A 55-day strike of 3,000 department store employees in San Francisco was terminated by an agreement negotiated by Mayor Rossi's Committee of Ten, which included a provision under which controversies arising out of the agreement will be referred to a board of arbitration. If the board is unable to reach an adjustment of the controversy, the services of an impartial outside arbitrator will be called upon.

In Philadelphia, a strike of 3,000 municipal employees, members of Local 222, American Federation of State, County and Municipal Employees (A. F. of L.) was terminated by an agreement reached by the City and the Union, which includes a provision that employees shall not strike or stop work, pending the settlement of differences by artibtration in all matters not prohibited by Federal, State and Local Laws.

Another agreement arrived at in San Francisco sent back to work the employees of 138 warehouses who had been locked out since August. The agreement, signed by the International Longshoremen's and Warehousemen's Union, C. I. O., and the Association of San Francisco Distributors, sets up machinery for settling disputes. Much of the credit for the settlement is given to Paul C. Smith, newspaper executive, who acted as mediator in negotiating the agreement.

An agreement between Lodge 2063, Steel Workers' Organizing Committee, and the Washburn Wire Co. (New York) ended the strike of 850 workers which had shut down the company's plant for 3 weeks. Terms of the agreement included a 5-day, 40-hour week, preferential shop, and provided that the Union's wage demands would be submitted to arbitration.

In Chicago a strike of stockyard employees, which had lasted from November 21 to December 4, was ended through the mediation of Mayor Edward J. Kelly, when the Union accepted peace terms and the workers reported back to their jobs.

A controversy which affected 15 independent grocery stores in New York City was ended on November 13, when the Retail Dairy, Grocery and Fruit Employees' Union of Greater New York, C. I. O., and the New York Federation of Food Merchants agreed to submit their differences to arbitration and to select an arbitrator to hear their grievances.

Arbitrator to Determine Future Profits and Wage Rates. The month-old strike of some 1,500 employees of the Mergenthaler Linotype Company was settled on December 13 by a novel agreement signed by the Company and the United Electrical Radio and Machine Workers' Union, Local 1222 of the C. I. O.

Th strike resulted from a proposal of the Company to put into effect a 10 per cent wage cut. Under the terms of the agreement, employees will receive 95 per cent of wages previously existing, the remaining 5 per cent to be deposited and to remain in a special bank account until September 1939, at which time an impartial arbitrator, to be chosen by the Company and the Union or by George W. Alger, Impartial Chairman of the Cloak and Suit Industry, is to determine whether this 5 per cent shall be paid to the employer or to the employees.

Assistance in reaching the agreement, which granted the Union sole bargaining rights and contained provisions for settling grievances, was given by the New York State Board of Mediation.

New York State Mediation Board. The first annual report of the Board of Mediation, made public on September 1, discloses that 231 industrial disputes were disposed of by mediation and 174 disputes were arbitrated during the first year's operation of the Board.

A total of 147 strikes were averted by the Board, 33 controversies were settled after strikes had occurred and 51 disputes were settled before actual mediation proceedings had begun. The board also referred 133 disputes to other organizations and rejected 209 matters as not coming within its jurisdiction.

Thirty-eight matters were arbitrated by members of the Board and 116 by members of the special panel of arbitrators set up for for this purpose. Twenty disputes were settled after submission to arbitration but before an award had been made.

During the first few months the Board was in operation, the report states, it offered its services as mediator in a large proportion of the cases handled by it. In the last six or eight months, however, a decided change has taken place and now, in practically all cases the Board is approached by one of the parties in dispute and requested to attempt to settle the controversy. Forty-nine per cent of the requests for such intervention come from labor unions, 36 per cent from employers and 15 per cent were initiated directly by the Board.

INDUSTRIAL ARBITRATION AWARDS

In a dispute concerning wage increases, are piece-rate workers entitled to an increase in pay in view of capital investments and improvements made by the Employer which have made possible a larger output and earning capacity under the prevailing rates?

Under an arbitration clause in the labor agreement, Union and Employer submitted to arbitration the Union's claim that employees engaged in a certain foundry operation were entitled to an increase in the piece-work rate of pay to parallel a general increase granted to other workers on an hourly pay basis. In opposition to this claim, the Company contended that such an increase in the piece-work rates was not justified, because the Company had, by a considerable capital investment, changed and improved the method of production whereby the piece-rate workers were able to increase their output and, consequently, their weekly earnings.

The Company's position was that general wage increases are made for the purpose of securing for the worker a larger weekly pay envelope and if, through technological improvements, this result is obtained, the piece-work rate loses its importance, since increased productivity is reflected in higher weekly pay. The Union attacked this argument as unsound, contending that payments based on piece-work rates are incentive wages adopted for the purpose of increasing production and that piece-rate workers should not be penalized by the method set up by the Employer and should be entitled to the same increase in their incentive pay as has been granted to other workers.

It was the Arbitrator's opinion, particularly in view of the fact that the Company had benefited from a saving in overhead and

a lowered cost on each item produced, that the workers on the piece-work rates were entitled to an increase and, on the basis of the evidence presented by both sides, he awarded them an increase of ten cents per hundred on the piece-work rate. (Docket 2522 of the Voluntary Industrial Arbitration Tribunal.)

Did the Employer act within his rights in discharging three Union members for refusing to work over-time because of a Union rule of "no over-time while Union men are laid off," which rule, however, was not included in the written agreement between the Union and the Employer?

Three Union members were discharged by Employer upon their repeated refusal to work over-time. The Union denied the justification for their discharge and demanded the reinstatement of the workers, with back pay.

At the hearing before the Arbitrator it was revealed that members of the Union understood, and had every right to understand, from their Union representatives, that there was in force, by oral Company-Union agreement, a condition of employment which prohibited over-time while Union men were laid off. As a result of this understanding among employees, three of them attempted to live up to this condition and their discharge resulted.

Basing his decision primarily upon the manner in which was performed the conditions of the written contract between the Union and the Company, in which there was a definite provision for limited over-time and in which appeared nothing to indicate an agreement upon a policy of "no over-time while Union men are laid off" or the right of any Company or Union official to amend the contract by verbal agreement, the Arbitrator found that the Employer had sufficient cause to discharge the three employees and, therefore, disallowed the Union's claim for their reinstatement with back pay. The Arbitrator's opinion, however, stated:

> There is raised here a question of management which transcends the conditions of the written contract. If employees generally understood the "no over-time" condition as a part of fixed employer-employee policy, how could the Employer have failed to know of that understanding among his employees? And knowing of that understanding, why did not the Employer take the pains typical of good management as a preventative of possible difficulty, to make the limitations of the signed

contract in this matter clear to the employees or the Union representatives? Failure to take such precautions, while it left the Employer free to discharge the complainants, as indicated above, certainly places upon the Employer the strongest moral obligation to reinstate the three who were discharged.

(Docket 2512 of the Voluntary Industrial Arbitration Tribunal.)

Is an Employer required to lay off all non-Union men before any lay-offs of Union members, under an agreement providing that no division of work shall occur until non-Union men are laid off, with due regard to an efficient staff?

A controversy arose between the Employer and the Union concerning interpretation of the following clause in the labor agreement entered into between them:

"At all times the work shall be divided as equally as possible. Before any division of work shall occur among Union men, non-Union men must be first laid off. The method of division shall be determined in each shop with due regard for maintaining an efficient staff."

Obliged by the slack business season to lay off a number of employees, the Employer laid off a number of Union men along with non-Union employees. Employer contended that the first two sentences of the disputed provision should be interpreted to mean that if lay-offs were necessary they should be equally spread among the workers of particular departments, the provision merely indicating that non-Union men should be the first laid off, and that the policy of division should apply equally to Union and non-Union workers. Employer further contended that certain employees held unique positions in his establishment and that the sentence concerning efficiency governed their employment.

The Union's contention was that, before discharging any Union men, the Employer was required by this provision of the contract to dismiss all non-Union workers "before any division of work shall occur among Union men", and that in those departments in which skilled labor was not necessary, the Employer was obliged to dismiss the non-Union employees and then transfer Union employees into these departments before laying them off. Employer took the position that if the Union's interpretation of a lay-off were to be accepted, it would amount to a discharge of all non-Union workers in the case of any extended lay-

off and this would constitute a closed shop, of which definitely no mention was made in the agreement.

The Arbitrator's award upheld the Union's claim that the method of lay-off used by the Employer was in violation of the contract and that non-Union workers must be first laid off before any Union workers, at the same time applying that part of the provision relating to "an efficient staff" to certain non-Union workers who, by reason of their special qualifications, were not subject to lay-off. (Docket 2370 of the Voluntary Industrial Arbitration Tribunal.)

WHERE THERE'S A WILL . . . .

Can we prevent industrial strife between capital and labor and substitute good will?

The simple answer to this question is: We can if we will; and I should like to insist at the outset that the collective will of both labor and management is the necessary condition for the achievement of any kind of industrial peace. It is an old adage that "Where there's a will there's a way", and in no area of human relations has the aptness of this adage been more abundantly proved. For again and again the will to industrial peace has been followed by the instruments for cooperative action. (From an address by Matthew Woll, Vice President, American Federation of Labor, as reported in *Greater New York.*)

INTERNATIONAL AND FOREIGN ARBITRATION*

ARBITRATION OF DISPUTES BETWEEN THE NATIONS OF THE BRITISH COMMONWEALTH

BY

NORMAN BENTWICH †

I HAVE been asked to write a short article on the use of arbitration in resolving disputes between members of the British Commonwealth of Nations. I gladly do so.

There is not yet much experience of arbitration in such matters. At the Imperial Conference of 1930, the question of a Commonwealth Tribunal to deal with justiciable disputes between the members of the Commonwealth was discussed and the recommendation was adopted that machinery of the kind was desirable, but that a permanent court on the lines of The Hague Tribunal should not yet be established. It was thought that until experience had been gained of the working of arbitration in these matters, it would be better to seek a solution by the appointment in each case of a special Tribunal.

For centuries the Judicial Committee of the Privy Council has adjudicated disputes between British Colonies about frontiers and territorial possessions. There is abundant record, amid the Acts of the Privy Council of the seventeenth and eighteenth centuries, of the authority exercised by that body in the cases which

* This section is concerned primarily with the economic aspects of international peace and the functioning of international economic peace machinery and with its coordination with activities within States, as presented in the American Commercial and Industrial Sections, and the corresponding activities in other nations as set forth under Foreign Arbitration.

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arose in the North American Settlements before they became the United States. The semi-political jurisdiction is still exercised today by virtue of an Article of the Statute about the Privy Council which prescribes:

> "It shall be lawful for His Majesty to refer to the Judicial Committee for hearing and consideration any such matter whatsoever as His Majesty shall think fit."

The reference may be either to the Judicial Committee, which consists entirely of judges of the highest courts in Great Britain and the Dominions, or to a general committee of the Privy Council. In the latter case the committee may advise the Crown, acting in its executive capacity, and may take account of political as distinct from legal considerations. References of the kind which were made during the last century included an inquiry into the political constitution of the States of Jersey; a dispute between the legislative bodies of Queensland in 1885; and the annexation of Cape Breton Island to Nova Scotia in 1886.

A recent judicial reference of the kind concerned a dispute between the Dominions of Canada and Newfoundland as to the ownership of Labrador (1937). There the question at issue was the definition of the boundaries as between the two dominions under various Statutes and Orders-in-Council. In that case, however, which was said by the Tribunal to be "worthy of the judgment of the Roman Senate," the Board could not consider questions of equity and convenience, but had to determine where, under the documents of title, the boundary was actually to be found.

It was in order to create a new form of imperial tribunal, more largely and broadly chosen than the Judicial Committee of the Privy Council, and for the purpose of dealing with disputes between different parts of the Empire in the broadest way, that the proposal was adopted at the Imperial Conference of 1930 as to the principles of commonwealth arbitration. The Tribunal would be established in each case submitted in the same manner as the original international tribunals of arbitration. It would be composed normally of five members, all drawn from within the British Commonwealth. Each party to the dispute would choose one member, who would be a judge or jurist of distinction, and should come from a country within the Commonwealth which was not a party to the dispute. Each party again would choose

another member who might or might not be a judge or jurist, and might or might not be from the country choosing him. The four members so chosen would then appoint the Chairman, who must be a judge or jurist of the Empire. In fact, no Tribunal on these lines has yet been appointed to arbitrate between the Dominions.

In 1932 the British Government invited the Irish Free State, as it then was—Eire, today—to submit to Commonwealth arbitration a dispute with regard to the land annuities under the Treaty. De Valera, however, while consenting to submit the question to arbitration, would not agree to the restriction of the membership of the Tribunal to citizens of the British Commonwealth of nations. He was willing to go to The Hague Tribunal. The dispute itself has since been settled amicably by direct diplomatic negotiations between the two Governments.

One Tribunal on the lines of the proposals of the 1930 Conference was appointed in 1933, to adjudicate a dispute between the Government of India and the War Office and Air Ministry of Great Britain with reference to defense expenditure. But India was not exactly a Dominion; nor did the composition of the Tribunal exactly correspond with the proposals. The Chairman was a distinguished Australian Judge, Sir Robert Garran; there were two British members of the Judicial Committee of the Privy Council, Viscount Dunedin and Lord Tomlin; and two distinguished Indian Judges, Sir Shadi Lal and Sir Shah Mohamed Sulaiman. The dispute was satisfactorily settled.

A grave matter affecting the principles of the British Commonwealth was submitted to the British Parliament in 1935, and might well have been referred to a Tribunal of Arbitration. It was the petition of the State of Western Australia praying for legislation to sever the State from the Australian Commonwealth. Had the precedent of the Council of the League of Nations and the Permanent Court of International Justice been followed, Parliament might have submitted the question to a Commonwealth Tribunal for an advisory opinion. It chose, however, to deal with it by the more hallowed method of a joint committee of the Houses. And on the advice of that committee it finally refused to receive the petition, on the ground that it asked for legislative action which, though legally within the power of the Imperial Parliament, was, by constitutional convention, outside its competence, unless there was a definite request of the Commonwealth

of Australia to Parliament to exercise its legal power. It may be of interest to note that the Joint Committee was composed mainly of distinguished administrators and ex-Ministers, and contained only one judge, the late Master of the Rolls, Lord Wright. The President was Lord Goschen, formerly an Indian Governor, and other members included Mr. Amery, the former Colonial and Dominions Secretary; the Marquis of Lothian, who is the Secretary to the Rhodes Trust, and Mr. Lunn, formerly the Labour Under-Secretary for the Colonies and Dominions.

Lastly, it may be noted that, when Great Britain and the Dominions adhered to the Optional Clause of the Statute of the Permanent Court of International Justice in 1929, and so agreed to submit to the Court disputes of a justiciable character in relation to all other states adhering to the Clause, a specific reservation was made concerning "disputes with the Government of any other member of the League which is a member of the British Commonwealth of Nations, all of which disputes shall be settled in such manner as the parties have agreed, or shall agree". At that time no general agreement existed between the members of the British Commonwealth with regard to the manner of settling disputes between them. But something in the nature of the Arbitration Tribunal, the principles of which were adopted in the Imperial Conference of the next year (1930), was already contemplated. The Foreign Secretary of Great Britain at the time, the late Arthur Henderson, explained the reservation that was appended to the signing of the Optional Clause as follows:

> "The members of the Commonwealth, though international units individually in the fullest sense of the term, are united by their common allegiance to the Crown. Disputes between them should, therefore, be dealt with by some other mode of settlement."

The Irish Free State adhered to the Optional Clause without making any reservation, because, as we have seen, she regarded her relations with Great Britain and with the other Dominions unqualifiedly as those of sovereign states to be regulated by the principles of international law. The other four self-governing dominions, however, made the same reservation as Great Britain. It is the common feeling of all the members of the Commonwealth, except Eire, that disputes between them which are of a legal character, in the widest sense of the term, should be dealt with by the broadest considerations that are more consonant with the

arbitration procedure, rather than by the application of the stricter legal principles, which is the province of the Permanent Court of International Justice or the Judicial Committee of the Privy Council.

THE CANADIAN LAW AND PRACTICE WITH REGARD TO ARBITRATION CLAUSES

BY

G. V. V. NICHOLLS *

IT may be stated without much fear of contradiction that the tendency of the Canadian employer of labor is to prefer self-regulation to governmental regulation. He sympathizes, of course, with any attempt to further the peaceful settlement of labor disputes, but by and large his sympathy for private conciliation and arbitration machinery, set up by agreement between employers and employees, is stronger than for a system, whether it be voluntary or compulsory, provided by the state.

I should not like to be too dogmatic, but it is probably fair to say that many elements in organized labor would agree with this view. Yet the fact is that so much attention has been paid to legislation like the federal "Conciliation and Labour Acts" and the "Industrial Disputes Investigation Act", and to numerous provincial statutes providing for conciliation and arbitration, that it is natural when one speaks of the peaceful settlement of labor disputes to think of state machinery. Little or nothing has been written concerning clauses in collective labor agreements by which the parties undertake to submit disputes arising between them to peaceful settlement, and in only a very few Canadian cases has the legal effect of such clauses been considered.

In recent years an increasing number of Canadian employers and their employees are entering into agreements covering such phases of employment relations as wages, hours, overtime and the like. Most of these collective agreements contain arbitration clauses, and all of them should do so. Private machinery for the settlement of labor disputes is likely, therefore, to receive increasing attention in Canada and to acquire increased importance. Because of their recognition of this trend, the In-

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dustrial Relations Committee of the Canadian Manufacturers' Association has recently appointed a sub-committee to study the whole question of arbitration clauses in collective labor agreements.

The arbitration clauses I have had an opportunity to examine can be divided, for the sake of convenience, into two general groups, depending upon whether or not they provide permanent machinery for the settlement of disputes. A typical provision of the first type is one that sets up a joint standing committee, upon which are representatives of the company and of the union. To this committee are referred all questions that may arise regarding the construction to be placed upon any clause of the agreement or any alleged violation of it. If the committee fails to bring about a settlement within a specified time, the dispute is referred to a board of arbitration consisting of nominees of the employer and the workers sitting under an independent chairman.

Arbitration clauses of the second type usually provide as follows: The workman, either personally or through the representative of a union or a shop committee, first brings his complaint before his foreman. If this method of settlement fails, the grievance is then submitted to the plant superintendent, and sometimes in turn to other senior officials in a specified order. Where a trade union is involved, the next step is usually for senior officials of the union and of the company to meet together. Only where all of these methods fail is the dispute referred to a board of arbitration. Almost invariably the agreements which were examined provided that boards should consist of one or two members nominated by each of the parties, these nominated members in turn to choose an independent chairman.

It is, of course, possible to vary the two more or less standard types of clause in an almost endless variety of ways and, in practice, features of one are often combined with features of the other. Naturally, variations may be necessary, depending upon whether the arbitration clause is to form part of a collective labor agreement or of the constitution of a works council, and, if the former, whether the agreement is between a single employer or a group of employers, on the one hand, and a trade union or the workers in a single plant, on the other. It may be necessary again to introduce variations depending upon whether it is the intention to provide for an open or closed shop.

Most, though not all, of the agreements examined had, however, certain features in common. First, the procedure for the settlement of grievances is usually in more than one stage, the purpose of this being to permit all the obvious methods of settling the dispute to be explored before recourse is had to formal arbitration. Most people will agree, I suppose, that where the complaint comes from a worker the employer should have every opportunity of correcting the alleged abuse before an arbitration board is set up to sit in judgment. In other words, arbitration should be a last resort after preliminary discussion and investigation have failed. Secondly, it is usual for the parties to agree to be bound by the decision of a majority of the arbitrators. Thirdly, the parties to a collective labor agreement often undertake not to declare a strike or lock-out while the machinery provided for the settlement of disputes is in operation.

In other respects, however, there was no uniformity in the particular agreements studied. Some provided that all differences arising between the parties should be submitted to arbitration; others specified that only those disputes that concern the interpretation of a clause in the agreement should be the subject of arbitration. Sometimes the arbitration clauses were complete in themselves and sometimes they provided that reference should be had to existing conciliation and arbitration legislation to decide points of procedure, and so on, not expressly covered in the agreement.

The existence side by side in Canada of arbitral machinery set up by private agreement between employers and employees and of machinery provided by the state might conceivably give rise to some complications. As a general rule, the parties to a collective labor agreement cannot derogate from the imperative provisions of social legislation if the effect of doing so would be to prejudice the worker. A collective agreement, for instance, could not validly fix a scale of wages less than that laid down in minimum-wage legislation. Five of the nine Canadian provinces, namely, Alberta, British Columbia, Manitoba, New Brunswick and Quebec, now have general statutes providing for the peaceful settlement of labor disputes. In addition, all the provinces, except Prince Edward Island and British Columbia, have conciliation or arbitration statutes aimed directly at the settlement of disputes arising in particular types of industry. Then, of

course, the Dominion has also set up machinery of its own. How does this mass of legislation affect, first, the willingness of employers and employees to include arbitration clauses in their collective labor agreements and, secondly, the legality of such clauses?

"The Industrial Conciliation and Arbitration Act" of Alberta, the "Industrial Conciliation and Arbitration Act" of British Columbia and the "Labour and Industrial Relations Act" of New Brunswick all lay down that where there is an agreement providing for the arbitration of disputes the employer and workers shall be exempt from those provisions of the statute governing investigation and conciliation. While, however, the New Brunswick statute is so worded as to prohibit strikes and lock-outs until the dispute has been dealt with under the terms of the private agreement, the provisions of the Alberta and British Columbia legislation prohibiting forcible interruptions of work are not applicable where the parties have set up their own machinery. Whether this will encourage or discourage the negotiation of collective labor agreements in the three provinces concerned remains to be seen.

The Manitoba "Strikes and Lock-outs Prevention Act", the "Quebec Trade Disputes Act", the various other provincial statutes providing for the settlement of particular types of dispute and the federal "Industrial Disputes Investigation Act" make no reference to private arbitration machinery. Where, as they sometimes do, they provide that no strike or lock-out shall be declared prior to or during the submission of a dispute to a board of conciliation, strikes and lock-outs are presumably also prohibited while the parties are attempting to adjust their differences in accordance with the procedure privately agreed upon by them. But where, as sometimes happens also, strikes and lock-outs are only prohibited between the application for a board of conciliation, as provided for in the statute, and the rendering of the award, strikes and lock-outs are apparently possible during a preliminary submission of the dispute to private arbitration. Most of these statutes lay down that their machinery can only be set in motion where a dispute actually exists between an employer and a number of his employees and where the parties are unable to adjust it themselves. It would seem unlikely, therefore, that resort could be had to the machinery provided by them until

the procedure agreed upon by the parties themselves had been tried and failed. The effect of this can hardly fail to be to discourage the inclusion of arbitration clauses in collective labor agreements. I say this because, if there is nothing to prevent the party against whom the award of private arbitrators has been given from appealing for a board of conciliation under a provincial or federal statute, it is unlikely that employers and workers will bother with private arbitration. If this should be the, probably unforeseen, consequence of the statutory provisions just referred to, then the statutes should be amended.

There is nothing in the legislation that sets up state machinery for the conciliation and arbitration of labor disputes which would make private arbitration clauses illegal. Such clauses are, of course, perfectly legal in Canada. It is still a principle of law that parties cannot enter into a contract, which normally would give rise to a right of action for a breach of it, and then withdraw such a case from the jurisdiction of the ordinary courts. The theory is that it is against public policy to oust the courts of their jurisdiction by contract. On the other hand, it is also an accepted principle of law that the parties may enter into an agreement providing that no breach of it shall occur until after a dispute has been submitted to arbitration. In short, they cannot validly agree that the award of the arbitrators shall be final and not subject to review, but they may outlaw any recourse to the courts until the award has been rendered.

As the courts have frequently put it, if the parties choose to determine for themselves that they will have a domestic forum, a duty is cast upon the court to give effect to their wishes. An agreement to submit a dispute to arbitration (in the legal phrase, a submission to arbitration) is binding upon the parties. Although a court may not order the specific performance of such a submission, it will, in its discretion, refuse to listen to a party who comes to it without first submitting the dispute to arbitration as he has agreed to do, and thus leave him in the position of having no other alternative but arbitration. Furthermore, if the parties have chosen to constitute a court for themselves, that court is a court to determine both the law and the facts; the law will make every reasonable presumption in favor of the arbitral award being final, certain and a sufficient termination of the matters in dispute. The award is binding on the parties unless there has been misconduct on the part of the arbitrators or a mistake of

law appears on the face of the award or of some document incorporated with it. In certain cases the courts will also set aside the award where the arbitrators themselves admit that they have made a mistake or where fresh evidence has been discovered. Only in these cases will the courts in practice set aside the award of arbitrators, but the point is that they reserve the right in all cases to review it and to say whether it should stand or not.

Although I know of only one reported case that attempts to do so, these general principles can, I think, be applied to arbitration clauses in collective agreements. The case of *Caven* v. *C. P. R. Co.*,[1] decided by the Judicial Committee of the Privy Council in 1925, is authority for the proposition that an undertaking of an employer and his employees to submit disputes arising between them to arbitration is binding and that the award of the arbitrators, arrived at in accordance with the formalities prescribed, must be respected and honored by them. Other things being equal, the decision as between the employer and workers may be made effective in a court of law.

Unfortunately other things are not always equal. As has been said, the court will refuse to listen to one of two private individuals who institutes legal proceedings in violation of his undertaking to arbitrate. The practical consequence of this is that a party who feels that he has been unfairly treated must arbitrate or keep silent. The employer and workers are in a somewhat different position. In the absence of the special legislation to which some reference has already been made, they can always ignore the arbitration clause in their agreement and resort to a strike or lock-out to enforce their rights. If the agreement was properly worded, so that the arbitration machinery could be brought into operation even though one party refused to cooperate, an award might still be rendered. But an award of that kind might be considered of somewhat theoretical value, for instance, to an employer against whom a strike had been declared.

Nor is there always any effective method of compelling a group of workers to abide by the award of the arbitrators once it has been rendered. A commercial or manufacturing company is a legal entity; it is suable in law for the consequences of its agent's acts and its assets are liable to satisfy any judgment that may

[1] (1925) 3 D. L. R. 841, confirming the judgment of the Alberta Court of Appeal reported at (1925) 1 D. L. R. 122, which had reversed the decision of the trial judge, (1924) 3 D. L. R. 783.

be rendered against it.[2] It is possible to bring into court an employer who has agreed to submit to arbitration any difference that may arise between him and his workers, to compel him to accept the award of the arbitrators. On the other hand, trade unions in Canada, with few exceptions, are unincorporated and unregistered. Except in the Province of Quebec, where the law has been recently amended, it is impossible in Canada to sue the average trade union under the name by which it is commonly known. In the English-speaking provinces, therefore, most trade unions cannot conveniently be sued and, whatever may be their theoretical status, are in practice legally irresponsible.

From all this it will appear that the enforcement of an undertaking in a collective labor agreement to submit disputes to arbitration is still dependent in Canada upon the good faith of the parties rather than upon legal sanctions. This statement needs modification only in the case of New Brunswick where, as stated, strikes and lock-outs are prohibited until the dispute has been dealt with as provided in the arbitration clause and in Quebec where a union may be required to answer in court for its refusal to carry out the terms of an arbitral award.

Whether the carrying out of collective labor agreements should be left wholly to the good faith of the parties or not is a question upon which there would probably be some difference of opinion in Canada. Organized labor, for instance, is on record as opposing any amendment to the law, which would require trade unions to register or incorporate and hence become legally responsible. Nor would there likely be unanimity on the question among employers. It should be remarked, however, that the conditions which in Great Britain, for instance, make good faith a sufficient sanction do not exist to the same degree in Canada. Labor is not as thoroughly organized in Canada as in Great Britain and Canadian unions lack, in some cases, the stability and conse-

[2] It is true that the decision of the Privy Council in *Young* v. *C. N. R.*, (1931) 1 D. L. R. 645, is sometimes referred to as holding that an action will not lie against an employer at the suit of a labor organization to compel him to carry out the terms of a collective labor agreement, the proper sanction for the violation of such an agreement being a strike. I do not so interpret it. The real question in this case was whether the appellant, an employee, who was not a member of the union, had established that the contract for service which existed between himself and the railway company included terms by which the company bound itself to him to observe the provisions of the collective labor agreement.

quent responsibility of the British unions. Two questions face industry in the Dominion at this moment. First, is it prepared to follow the lead of Great Britain and some of the Scandinavian countries and regulate its employer-employee relations through the medium of a nation-wide system of collective bargaining? If this first question is answered in the affirmative, secondly, is good faith a sufficient sanction in a country like Canada or should collective agreements be made enforceable in a court of law?

So far as the law goes, in Canada employers and workers may insert any provisions they please in their arbitration clauses, provided only that such provisions are not contrary to public policy; do not, for instance, seek to oust the jurisdiction of the courts. Nor is any particular form of submission required in Canada, except in Quebec where all collective labor agreements must be in writing and a copy deposited with the Minister of Labor. Indeed in addition to "The Industrial Conciliation and Arbitration Act" of Alberta, the "Industrial Conciliation and Arbitration Act" of British Columbia and the "Labour and Industrial Relations Act" of New Brunswick, already referred to, only one Canadian statute, so far as the writer is aware, provides directly for private arbitration clauses, and only two indirectly. Like its English model, the federal "Conciliation and Labour Act" authorizes the registration of boards of conciliation voluntarily set up by the employers and workers in a particular industry, though no one has ever taken advantage of the clause.

Then two Quebec statutes, the "Professional Syndicates' Act" and the "Collective Labour Agreements' Act", make provision for collective labor agreements in general and in doing so indirectly affect private agreements to submit disputes to arbitration. The "Professional Syndicates' Act" requires all collective labor agreements to be in writing and hence arbitration clauses included in such agreements must be in writing also. By the "Collective Labour Agreements' Act" the Lieutenant-Governor in Council is authorized to order that a collective labor agreement respecting any trade, industry, commerce or occupation shall also bind all the employees and employers in a stated region of the Province of Quebec. The kind of collective agreement contemplated by the Act is clearly one respecting wages, hours of work and apprenticeship, but section 10 provides:

> "The degree may also render obligatory, with or without amendment, the provisions of the agreement respecting the classification of opera-

> tions and the determining of the various classes of employees and employers, and also such provisions as the Lieutenant-Governor-in-Council may deem in conformity with the spirit of this act."

There appears to be no reason why, under the last clause of this section, an arbitration clause should not be declared binding on all the employees and employers in a stated region of the Province.

In the view of President Roosevelt's Commission on Industrial Relations in Great Britain, as expressed in the Commission's report of its recent survey, the development of conciliation machinery by collective arrangements between employers and workers has now become the dominating feature of that country's employer-employee relations. The same thing cannot be said of Canada. Theoretically the ideal method of settling industrial disputes is undoubtedly by means of machinery provided by the parties themselves; all possibilities of direct settlement should be exhausted before recourse is had to outside help. Arbitration machinery, whether state or private, can only operate successfully in an atmosphere of mutual goodwill and cooperation, and experience appears to have demonstrated that the necessary atmosphere is more likely to exist where employers and workers have provided for the peaceful settlement of differences as part of a general agreement regulating their industrial relations. In these circumstances it is unfortunate that some of the statutes providing for the arbitration of industrial disputes should discourage industry from duplicating their machinery and hence retard the development of private arbitration in Canada.

INDUSTRIAL NOTES

French High Court of Arbitration. The High Court of Arbitration, created by the law of March 4, 1938, establishing the modern French labor code, held its first sitting at the Palais-Royal on May 9, 1938, since which time it has sat regularly twice a week and has rendered several hundred judgments. The problems coming to the court for decision include the field of application of the new conciliation and arbitration procedure, definition of a collective dispute, powers of arbitrators and the powers and scope of the court itself. Its first decisions are of particular importance, as they outline the principles which will form the foundation of future decisions.

Under the procedure contemplated by the law of March 4, 1938, the powers of arbitrators are limited to determine matters of collective interest and strictly only those matters submitted to them. The arbitrators are bound by law in controversies which relate to the execution of collective contracts, or to laws and decrees regulating labor, but they may decide in equity in other types of controversies, particularly in those of an economic nature. Their powers to modify wages are limited by the official cost-of-living indexes. Modifications may only be considered when the variation in the cost of living exceeds by at least 5 per cent the index in use at the date on which the wages were determined, and the modification must be in proportion to the variation of such index, unless proof is submitted that such adjustment is incompatible with the economic situation of the branch of economic activity concerned.

No appeal from the awards of arbitrators may be had to the regular courts of appeal, but may be taken to the High Court of Arbitration, mentioned above, by the labor unions, syndicates of employers or individual employers who are affected by the award. Appeals may be had on claims of non-competence or excess of power by the arbitrators or umpire or for violations of the law. The High Court may decide both on matters of procedure and on the merits of the case, but the Court itself does not take the place of an arbitrator to settle disputes. When an award is vacated by the court it appoints a new arbitrator for a new arbitration.

French Decision Concerning the Making Up of Time Lost on Holidays.[1] The question of the making up of time lost on holidays has given rise in France to a number of disputes in regard particularly to the right of employers to require the making up of lost time and the remuneration of workers and salaried employees paid weekly or monthly. An arbitration award issued on October 28, in a dispute in the paper industry, laid down that in the absence of provisions to the contrary, the staff of the establishment in question was not entitled to refuse the recovery, under lawful conditions, of days lost as a result of holidays, and that employees paid weekly or monthly could make no claim to

[1] Reprinted from *Engineering* (London), November 11, 1938.

additional remuneration in connection with such recovery. That award is in conformity with two other awards by the High Court of Arbitration on May 16 and June 13, 1938.

Civil Service Arbitration Tribunal (England).[1] An arbitration has recently been completed by the Civil Service Arbitration Tribunal, after hearings which lasted thirty days, concerning the wage claims of 125,000 members of the Union of Post Office Workers. The Tribunal then took up parallel claims of smaller, independent bodies, and at the time this note was written its award had not been announced.

Under awards by the Tribunal, recently announced, civil service employees have won a number of increases in pay. These include an increase in wages to 3,000 clerks in the various Air Ministry establishments throughout the country; an increase to clerks of the general class and in departmental classes, affecting some 45,000 employees, and an increase to bookkeepers in various War Office establishments, affecting about 1,000 bookkeepers at the Royal Arsenal at Woolwich and in the various ordinance depots in the provinces.

English Decision Awards Miners Unemployment Pay During Paid Vacation Week. According to a recent decision of an umpire appointed in a dispute between miners and owners of a colliery near West Auckland, in the North of England, the miners were awarded six days' unemployment benefit for a week during which the colliery was closed for repair work, but for which the miners also received their first week's holiday with pay. Following representations by the Durham Miners' Association, the holiday pay was regarded by the umpire as an *ex gratia* payment by the employers and the men were awarded unemployment pay for the full week.

Irish Flour Milling Workers Agree to Arbitrate. 1,600 flour milling workers in Ireland have accepted a proposal of their employers that the question of wages and conditions of labor be submitted to arbitration by an independent arbitrator to be appointed by the Minister for Industry and Commerce. The Dublin workers who voted against arbitration will accept the general decision and strike notices were withdrawn upon acceptance of the proposal.

[1] See Vol. 2, No. 2, p. 177.

Ricksha Strike in Singapore. Ricksha pullers in Singapore seem far removed from industrial strife, yet the *Times* of Malaya Singapore reported a dispute between ricksha pullers and owners over the question of hire-charges, the pullers demanding a reduction in the charges from 40 to 20 cents and striking when the request was refused. Arbitration was offered to both sides by the Heng Ann Community Guild and the Hock Ching Huay Kuan, with an appeal that the parties bear in mind the crisis through which the Chinese nation is passing and settle their dispute amicably.

COMMERCIAL NOTES

Court of Arbitration of the International Chamber of Commerce. Within the period running from June 27, 1937, to October 21, 1938, nine sessions of the Court of Arbitration of the International Chamber of Commerce were held, in the course of which the Court disposed of 36 pending cases and received 31 new cases for adjudication. These involved: as claimants—8 Belgians, 7 Frenchmen, 4 Germans, 3 Swiss, 2 Hungarians, 2 Italians, 1 Bolivian, 1 Luxemburger, 1 Dutchman, 1 Norwegian and 1 Swede; as defendants—11 Frenchmen, 6 Germans, 3 Moroccans, 3 Dutchmen, 2 Belgians, 1 American, 1 Britisher, 1 Bulgarian, 1 Indian, 1 Swede and 1 Jugoslav. Among the new cases received for arbitration were the following:

No. 665. Parties: two French firms. Dispute concerned the execution of a contract for the manufacture of apparatus for the production of X-rays and electro-medical treatment, the defendant company claiming the cancellation of the contract, exemption from the penalties therein provided and damages of 2 million French francs from the claimant company, which asserted a counter-claim for damages in the amount of 29 million French francs.

No. 666. Parties: French and American. Dispute concerned the cancellation of a license contract for the manufacture and sale of a certain carpet in France.

No. 668. Parties: French and British. Dispute concerned the execution of a contract under which the French inventor granted defendant a paid option on a license for the exploitation of two patents for the manufacture of gas recipients. The inventor claimed to be liberated from his obligations and claimed minimum damages of 3,500 pounds. The defendant presented a counter-claim for the refund of 300 pounds.

No. 671. Parties: French and Belgian. Dispute concerned the violation by the Belgian company of a clause inserted in several contracts relating to the sale of iron beams and bars, according to which these wares might not be sold to Germany.

No. 672. Parties: Norwegian and German. Dispute concerned the execution of a license contract for manufacture of margarine and food-fats, the Norwegian inventor claiming that the German firm should be required to account for the production based on his process.

No. 686. Parties: French and Jugoslav. Dispute concerned the cancellation by the French company of a contract relating to the rights for repairing, manufacturing and selling in Jugoslavia its dash-board instruments of aircraft and motor vehicles. The French company's claims included confirmation of the cancellation of the contract, condemnation of the Jugoslav company to the payment of the outstanding balance of its account and the payment of royalties.

Reich Economic Court.[1] The Reich Arbitration Court for War Claims, established in 1916 for the settlement of claims of individuals and corporations against the Reich, and reconstituted in May, 1920, under its present name of Reich Economic Court, with increased jurisdiction with regard to legal matters affecting the public interest and arising from disputes betwen the Reich and private individuals, has been further affected by a law promulgated on February 25, 1938, which provides for the Court's reorganization and a more strict definition, as well as an amplification, of its powers.

The new law provides for the abolition of the German Cartel Court and the incorporation of its functions into the Reich Economic Court, and gives the latter the character of an administrative court, with jurisdiction limited in most instances to disputes between organs of the State or between the State and private individuals and corporations. As a cartel court it will also have to decide disputes between firms and cartels.

The court comprises one chief justice, a number of divisional presiding judges and a number of advisory judges, selected from among high public servants and appointed for life. They are aided by a number of lay judges selected by the chief justice from a panel of prominent business men, industrialists, bankers, economists and other suitable persons nominated by the Reich Minister of Economy.

The Civil Procedure Code is applicable to procedure in the Reich Economic Court, but representation by a member of the bar is not obligatory. Court costs vary between two and ten per cent of the claim.

[1] For full report from which this is summarized, see article by Ware Adams, Consul in Berlin, in *Comparative Law Series*, Vol. 1, No. 7, p. 270.

Commercial Arbitration in Sweden. Sweden, whose industrial system of arbitration has been widely reported recently, as a result of the survey made by President Roosevelt's fact-finding commission, has also several active groups carrying on commercial arbitration. Three of these groups are the subject of a report in the July, 1938, issue of *Comparative Law Series*,[1] by Assistant Trade Commissioner F. A. M. Alfsen of Stockholm.

The most active of these arbitration groups is the Arbitration Board for Trade in Grains and Feedstuffs, which has, since its organization in 1916, adjusted 1,726 cases, 24 of which were heard and decided in 1937 and 34 in 1936. The noticeable decline in the number of controversies submitted to the Board is attributed to the ever-growing State monopoly of the grain trade and not to any loss of faith in arbitration. In its contracts the State has provided for automatic adjustment of all differences according to fixed scale.

The oldest of the arbitration groups, the Swedish Technical-Industrial Institute of Arbitration, organized in 1913, has disposed of 404 cases—14 during the period running from October 1, 1936, to September 30, 1937, and the same number during the previous year.

The Arbitration Board of the Stockholm Chamber of Commerce, organized in 1917 and identified chiefly with the Swedish hay trade, has witnessed a marked decline in the number of cases submitted in recent years, due to the gradual decline in the consumption of hay. Only three cases came before the Board in 1937.

Mr. Alfsen's report ends with this statement:

> In the opinion of authorities there has been no lessening in the application of arbitration procedure in the matter of commercial, industrial and technical disputes in recent years. On the other hand, it is evident that the very prosperous conditions which have obtained during the past three years in this country have contribtuted to an apparent decline in the incidence of disputes; but arbitration as a just, efficient and time-saving instrument in the adjustment of differences is still held in justifiable esteem.

Indian Arbitration Act, 1937. Through the courtesy of its collaborator in Cawnpore, Mr. H. W. Morgan, the JOURNAL has received a copy of the text of the Arbitration (Protocol and Con-

[1] See also *Arbitration Procedure in Sweden*, by Algot Bagge, Judge of the Supreme Court in Sweden, THE ARBITRATION JOURNAL, Vol. 1, No. 3, p. 271.

vention) Act, 1937, which was passed by the Indian Legislature and received the assent of the Governor General on March 4, 1937.

The purpose of the act was to make certain further revisions respecting the law of arbitration in India in order to give effect to the Protocol on Arbitration Clauses and to enable the Convention on the Execution of Foreign Arbitral Awards, to which India was a State signatory, to become operative in British India, including British Baluchistan and the Sonthal Parganas.

Provisions of the Act relate to: interpretation of the term "foreign award", stay of proceedings in respect of matters to be referred to arbitration, effect of foreign awards, filing, enforcement and conditions for enforcement of foreign awards, requirements as to evidence and rule-making powers of the High Court.

Removal of an Arbitrator.[1] The case of *Owners of S. S. "Catalina" & Others* v. *Owners of M. V. "Norma"* [2] for the removal of an arbitrator on the ground that he had misconducted himself by acting unfairly and without impartiality between the parties, raises an issue which can be far reaching. The one point that strikes us is that, whatever the merits or demerits of the case, the arbitrator in question was not a party to the proceedings, was not heard and apparently was given no opportunity of appearing and meeting the position which was *in esse* a case against him.

An application for the removal of an arbitrator under Section 11 of the 1889 Act is by one of the parties against the other, and the arbitrator is not a party. It would, therefore, seem that amendment of the Arbitration Acts and/or Rules of the Supreme Court is overdue, and they should be amplified by the provision that motion should be served on the arbitrator himself, to show cause why he should not be removed and that he be entitled to give evidence on his own behalf and reply to any evidence given, or even be forced by the Court so to do if necessary. The Court would then be in possession of wide powers and could insure justice to all parties.

One further fact emerges and that is, the arbitrator should give no reasons, verbal or otherwise, for any decisions he may make. This has been accepted as a fundamental rule by all authorities on arbitration and is again forcibly brought to notice.

[1] Reprinted from *The Journal of the Institute of Arbitrators (Incorporated)*, Vol. XII, No. 3 (October, 1938).

[2] Reported in THE ARBITRATION JOURNAL, Vol. 2, No. 4 (p. 416).

INTER-AMERICAN COMMERCIAL ARBITRATION AND GOODWILL

IMPRESSIONS OF A BUSINESS OBSERVER AT THE LIMA CONFERENCE

BY

JAMES S. CARSON *

SEVEN International Conferences of American States, as they are now officially designated—Pan American Conferences, as they are popularly called—met in the interval spanning the half century marked by that day in April, 1889, when James G. Blaine of Maine, then Secretary of State of the United States, called the first gathering to assemble in Washington, D. C., and that day of last December, when in Lima, Peru, representatives of the twenty-one republics of the Western Hemisphere reunited to send to a listening and expectant world the message of the Americas, a clarion call of the New World. What was said in the Declaration of Lima marks an epoch, not only in the history of inter-American relations but perhaps in the story of the world of tomorrow. In that document, twenty-one sovereign states gave notice that the American system must and shall prevail in the Western Hemisphere over every totalitarian concept of government, Fascist, Nazi or Communistic. That, in my opinion, was the great achievement and outstanding success of the Lima Conference. As time goes on I am sure its historic significance will grow.

A little less than a quarter of a century ago the world was shocked when a Chancellor of the German Empire referred to written treaties as "scraps of paper". Recent happenings have forced even the most idealistic and non-cynical to agree with that pronouncement. We have seen treaties and conventions ruthlessly set aside, both in Europe and Asia, in order to square with the doctrine that "might makes right". Signed and sealed documents mean nothing in the present-day world. We have come to be skeptical of everything that has been exactly set forth in international agreements. The dottings of the i's and the crossing of the t's have been but mirth-producing factors for the Gods.

The fact that the Eighth International Conference of American States, which was in session in Lima, Peru, from December 9 to December 28 last, was the first gathering of its kind which did

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not enter into a single convention or formal written treaty speaks eloquently for its sincerity and unity of purpose. It declared unequivocally to the world the spirit of the Western Hemisphere in the Declaration of Lima and the Declaration of American Principles, those two pronouncements which not only spoke the minds, but the hearts, of the people of the Northern and Southern Continents. Written treaties and conventions are breakable, as we have seen, but the spontaneous aspirations of twenty-one separate governments voice a spiritual unity and common accord of surpassing strength and unbreakable because of their very intangibility and sincerity.

Now what did this Declaration of Lima say? Broadly speaking, it serves notice that all the American nations stand together as a solid block pledged to defend themselves and one another against threats to their peace, their institutions or their territorial status. In it the Americas, North, Central and South, serve notice on the world that political and economic problems shall be met and solved in a manner that shall unite rather than separate the different governments and peoples of the New World. What a spirit, and how much the mother countries of the Old World need it today!

Other things which the Declaration pledges are:

(1) An agreement that any problem which involves the peace and security of any one of them will become the problem of all of them.

(2) A plan to solve future problems by conference of foreign ministers at designated Latin American capitals at the call of any single state.

(3) A declaration that a European system of extending protection to racial, religious or language minorities will not be tolerated in the Americas.

(4) A declaration that aliens may not collectively exercise political rights conferred upon them by their countries of origin. (This aimed at the Hitler pronouncement that "Once a German always a German.")

The Declaration of American Principles embraces the following:

(1) Intervention of any state in the internal or external affairs of another is inadmissible.

(2) All differences of an international character shall be settled by peaceful means.

(3) The use of force as an instrument of national or international policy is proscribed.

(4) Relations between States should be governed by precepts of international law.

(5) Respect for the faithful observance of treaties constitutes the indispensable rule for the development of peaceful relations between States, and treaties can only be revised by agreement of the contracting parties.

(6) Peaceful collaboration between representatives of the various States and the development of intellectual interchange among their peoples are conducive to the understanding by each of the problems of the other, as well as of the problems common to all, and make more readily possible peaceful adjustment of international controversies.

(7) Economic reconstruction contributes to national and international well-being as well as to peace among nations.

(8) International cooperation is a necessary condition to the maintenance of the aforementioned principles.

These declarations are not promises, not treaties or conventions. They set forth the *aspirations* of the peoples of the New World, and, even if only approximately followed, should serve as guideposts to the Old World which threatens to plunge itself into darkness and the morass of hatred and ultimate despair because the banners of greed and might are made to prevail over those of reason and right. By these declarations the Americas approve the Drago Doctrine which renounces the collection of debts by force; the Calvo Clause which restricts the rights of aliens to laws of the land in which they reside, except in the case of a denial of justice. They also approve the thesis of Secretary Hull that political peace is dependent on sound economic foundations. In this connection the Conference called on the governments of the Northern and Southern Continents to reduce to the greatest extent possible all restrictions on international trade. It also specifically endorsed the Hull trade agreement program.

As an aftermath of number eight of the Declaration favoring the development of intellectual interchange among the peoples of the three Americas, the republic of Chile introduced a project which culminated in The First American Conference of National Committees on Intellectual Cooperation, which met in the city of Santiago shortly after the close of the Lima Conference. The parley was in session for seven days, with delegates present from

most of the American countries including the United States. Fifty-three resolutions were adopted covering a broad field of cultural relationship among the American countries. A delegate from the Rockefeller Foundation, after pointing out that cultural efforts, to be effective, must be hooked to projects having for their purpose the strengthening of commercial and political ties, read a cablegram from James T. Shotwell, Chairman of the American National Committee on Intellectual Cooperation, announcing the award of forty-two scholarships for Latin American students. Twelve were for study at the Julliard School of Music and thirty at the National Academy of Design.

Such gestures are more than aspirations and so was the action taken by the delegates at Lima in the matter of Inter-American Commercial Arbitration. Recognizing the importance of the satisfactory settlement of disputes or differences between the merchants of the various countries of the Americas, the Conference adopted unanimously and amid great applause the following resolution:

CONSIDERING:

That the Seventh International Conference of American States authorized in Resolution XLI the establishment of a system of inter-American arbitration, in which at the same time were approved certain standards in regard to procedure and practice in connection with that matter, and

CONSIDERING:

That the Eighth International Conference of American States has received and studied the report of the Inter-American Commercial Arbitration Commission, created in accordance with the aforementioned Resolution of the Seventh Conference,

THE EIGHTH INTERNATIONAL CONFERENCE OF AMERICAN STATES

RESOLVES:

1. To approve and again call to the attention of the American Republics the standards of commercial arbitration approved by the Seventh International Conference of American States, especially that which refers to the validity and execution of arbitration clauses in contracts. The Conference wishes at the same time to offer a vote of praise to the Republic of Colombia for having incorporated these standards in its Law No. 2 of 1938, being therefore the first Republic of the Continent to put them into effect.

2. To urge upon the Chambers of Commerce of the American Republics the establishment of Permanent Commercial Arbitration Tribunals as a result of the Conferences of the Permanent Mixed Com-

mission, taking into account the standards approved by the Seventh International Conference of American States.

3. To recommend that there be approved in principle the inclusion of arbitration clauses in commercial contracts entered into between any of the American Republics, with the idea of safeguarding and promoting better understanding and friendly commercial relations as a result of such contracts.

Arbitration of business disputes has become a recognized practice in the United States and nine years ago the first steps were taken to extend the system to the Latin American Countries. In 1934 the Governing Board of the Pan American Union authorized the American Arbitration Association and the Council on Inter-American Relations to form the Commission and in the intervening years tribunals and panels of arbitrators have been set up in the principal cities of the Southern Republics. It is now possible to arbitrate differences between merchants in the United States and those of Spanish and Portuguese speaking countries with comparative ease and dispatch. The Lima Conference, by approving and encouraging this movement, gave one more evidence of its practical usefulness and a further push towards peace and understanding.

Another proposal of great import to lovers of human liberty and tolerance was introduced and valiantly fought for by the island republic of Cuba. In its original form the resolution repudiates all persecution of a collective character because of racial or religious motives which places a substantial number of human beings in a material situation in which it is impossible for them to live honorably and to carry on their activities within a minimum standard of dignity. It asked the nations of America to assume the moral obligation to continue to apply, as heretofore, the principles of tolerance and respect for human dignity.

When the Cuban Delegation returned home its Chief, Secretary of State Juan J. Remos, had the following to say to the press of Havana: "Pan Americanism is now a reality. One of the signal victories of our delegation was the acceptance of its motion against racial and religious persecution. The nations of America solidified their ties of understanding and unity. I wish to state that as a result of the Lima Conference I now have more faith than ever in the unity of the peoples of the Americas." The significant thing to me is that such sentiments were echoed by practically every one of the eleven foreign ministers attending the Conference and by delegates of the Southern Republics generally.

All in all the Lima Conference passed 110 resolutions and recommendations, but, important as these may prove to be, they will always be of comparative insignificance when set up alongside the great intangibles. The Lima Conference killed the ghost of Yankee imperialism which had stalked the inter-American stage for four generations; it made real for the first time the multilateral aspects of the Monroe Doctrine; it generated the Pan American spirit in a stronger flow from South to North; it recommended ways and means to combat the well organized programs of the totalitarian States to control, not only the markets, but the thought of South America; it blazed a trail for a distraught world leading to the peaceful settlement of international disputes. In looking upon these fine achievements North Americans should take pride in the fact that Latin Americans very generally attributed to the fine character, deep sincerity and quiet persistence of the Secretary of State of the United States much of the success attained.

Pan American unity cannot be achieved in a day. The idea has been brewing since Simon Bolivar called the first conference in Panama more than 100 years ago. For generations it has been a dream, the scorn of sceptics and the toy of orators. The Conference at Lima came nearer giving it substance than any like gathering yet held. In the years ahead this will be more and more recognized.

NOTES AND COMMENT

Thomas J. Watson New Chairman of the Inter-American Commercial Arbitration Commission. At a meeting of the Inter-American Commercial Arbitration Commission on January 17, in New York City, Mr. Thomas J. Watson, President of International Business Machines Corporation, accepted the Chairmanship of the Commission. Mr. Watson was nominated for Chairmanship by the Pan American Union, and Hon. Spruille Braden, who was Chairman of the Commission for the first five years of its existence, becomes Honorary Chairman, in view of his recent appointment as United States Ambassador to the Republic of Colombia. Over three hundred guests attended the meeting, among them being the Hon. Ricardo Castro Beeche, Minister of Costa Rica to the United States; Hon. Jaime Gutierrez Guerra, Consul of Bolivia; Hon. Oscar Correia, Consul General of Brazil; Hon.

Pablo Suarez, Consul General of Cuba; Hon. A. R. Hidalgo Z., Consul General of Ecuador; Hon. F. Alvarado Gallegos, Consul General of El Salvador; Hon. Hector Giron, Consul General of Guatemala; Hon. Rafael de la Colina, Consul General of Mexico, and Hon. E. Pardo de Zela, Consul General of Peru.

The Presiding Officer of the meeting was Dr. James Rowland Angell, former President of Yale University and President of the English Speaking Union, and addresses were made by Ambassador Braden, Mr. Watson and Mr. James S. Carson, Chairman of the United States Committee of the Commission.

Messages received from President Roosevelt and from Dr. Leo S. Rowe, Director General of the Pan American Union, were read to the guests.

American Citizens as Arbitrators.[1] Attorney General Homer S. Cummings, recently named arbiter in the Beagle Channel controversy between Argentina and Chile, will not be the first American citizen to arbitrate a territorial question between those two governments, according to the Pan American Union. Forty years ago Argentina and Chile named William I. Buchanan, our Minister in Buenos Aires, umpire of the arbitral commission that settled their boundary dispute over the Punta de Atacama. Mr. Cummings, moreover, is not the only official of the present administration to have been named arbiter of an inter-American boundary question, for if the Peruvian-Ecuadorian Boundary Commission assembled in Washington at the present moment does not come to an agreement, the two mentioned governments have already agreed, by a protocol signed in 1924, to submit their dispute to the arbitration of President Roosevelt.

In addition to the above three cases there are many other examples of American citizens serving as judges in inter-American arbitrations. As a matter of fact, Union officials pointed out, there have been no less than 10 such examples, the first of them taking place as far back as 1875, when Cornelius A. Logan, United States Minister to Chile, arbitrated a dispute that had arisen between the government of the latter country and the Republic of Peru. Twenty-five years later, another American Minister to Chile, Henry L. Wilson, accepted the post of arbiter

[1] Reprinted from "Comments on Argentine Trade" published by The Chamber of Commerce of the United States in the Argentine Republic; Vol. 17, No. 12, July, 1938.

in a claims controversy between Bolivia and Chile, but later resigned without having rendered a decision.

The second instance of an American citizen serving as judge in an inter-American arbitration occurred in 1876 when President Rutherford B. Hayes was named arbiter in a boundary controversy between Argentina and Paraguay. His award, rendered two years later, put an end to the dispute, and the grateful Paraguayans named one of their cities Villa Hayes in his honor.

In 1886 Grover Cleveland, then serving his first term as President of the United States, was asked by the governments of Costa Rica and Nicaragua to arbitrate their boundary question. Cleveland rendered a decision two years later, but in 1896 the question was reopened and again submitted to the President. Cleveland, then serving his second term, named General E. P. Alexander arbiter of the dispute, and the question was finally settled by the latter towards the end of the century. In 1889, those same two governments signed an agreement to submit another dispute, this time over the proposed interoceanic canal, to arbitration by the President of the United States, but the proposed arbitration never took place. Costa Rica and Nicaragua, however, were not the only Latin American republics to submit boundary controversies to President Cleveland. In 1895, upon invitation of the governments of Argentina and Brazil, he settled their dispute over the Misiones district, an outstanding achievement because, prior to the arbitration, the two countries had been on the verge of war.

Woodrow Wilson and Calvin Coolidge complete the list of American presidents asked to arbitrate Latin American boundary questions. To Coolidge fell the difficult task of settling the long-standing Tacna-Arica controversy between Peru and Chile. His recommendation, made in 1925, that a plebiscite be held in the disputed area, was not carried out, however, and the question was ultimately settled by direct negotiations between the two governments. Wilson, in 1914, was named arbiter of a dispute between Honduras and Guatemala, but no arbitration resulted at that time and the question was finally settled in 1930 by an arbitral tribunal presided over by Chief Justice Hughes. Another Chief Justice, Edward D. White, arbitrated in 1914 the boundary dispute between Panama and Costa Rica.

ARBITRATION LAW

THE STATUTE OF FRAUDS AS A DEFENSE IN A PROCEEDING TO COMPEL ARBITRATION

BY

JOHN K. WATSON *

AT common law it was the well settled rule that an agreement to submit to arbitration a dispute as to title to real property must satisfy the requirements of the statute of frauds,[1] and although the courts have given the question little consideration, the same rule would appear to be applicable to a submission to arbitrate a dispute over title to personal property.[2] Logically there would seem to be no distinction in that regard between a submission and an agreement to arbitrate a controversy arising in the future, but, due perhaps to the relative scarcity of such agreements under the common law, there is a dearth of authority for the proposition.

While the modern arbitration statutes almost unanimously provide that contracts to arbitrate future disputes be in writing, there is usually no specific requirement that they be signed by

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[1] Sturges, "COMMERCIAL ARBITRATIONS AND AWARDS", Sec. 70. Note, 22 L. R. A. (N. S.) 716 (1909)—*cf.* Gavit, "*Jurisdiction of the Subject Matter and Res Judicata*", 80 U. Pa. L. Rev. 386, 392-393 (1932).

[2] *Bunnell* v. *Reynolds*, 205 Mo. App. 653, 226 S. W. 614 (1920)—*cf.* Sturges, "COMMERCIAL ARBITRATIONS AND AWARDS", Sec. 71.

the person sought to be charged therewith.[3] Accordingly it has been held that the signature of the party sought to be charged is not a requisite to the validity of the contract to arbitrate, providing that he has evidenced his acceptance in some other manner.[4] Thus a difficult problem arises where an otherwise enforceable promise to arbitrate is incorporated in a contract for the sale of merchandise which latter contract may fall within the type of statute of frauds which requires that the writing be signed by the party sought to be charged, and where one party to the contract seeks to compel arbitration in the face of the objection that the statute has not been complied with. In such a case, should the court to which the application is made simply satisfy itself as to the existence of a promise to arbitrate, and leave it to the arbitrators to pass upon the applicability of the statute of frauds, or should the court itself determine whether or not the statute of frauds is applicable and, if applicable, refuse to compel the parties to arbitrate?

Three possible solutions to the problem have been suggested:

1. That the arbitration law contains its own "statute of frauds", which, if complied with, entitles either party to an arbitration irrespective of what defenses the other party may raise at such arbitration with respect to the portion of the contract relating to the sale of goods.

2. That the general statute of frauds extends to and renders unenforceable the portion of the contract relating to the promise to arbitrate, and therefore constitutes a defense which, if raised, must be tried and determined by the court.

3. That even though the promise to arbitrate be valid, the court should nonetheless determine whether the general statute of frauds constitutes a defense to the balance of the contract, since, if it does, any arbitration proceeding with respect to it would be futile in contemplation of law and should, therefore, not be required.

[3] See, for example, New York Civil Practice Act, Sec. 1449, which provides as follows: "A contract to arbitrate a controversy thereafter arising between the parties must be in writing. Every submission to arbitrate an existing controversy is void, unless it or some note or memorandum thereof be in writing, and subscribed by the party to be charged therewith, or by his lawful agent."

[4] *Japan Cotton Trading Co., Ltd.* v. *Farber*, 233 App. Div. 354, 253 N. Y. S. 290 (1931). That rule has been consistently followed in New York by an unbroken line of decisions at Special Term.

The first solution was recently adopted by a majority of the Court in a recent New York case.[5] In that case it appeared that the seller, pursuant to an alleged oral understanding, sold to the buyer certain cotton goods, which it purported to confirm by signing and mailing to the buyer written confirmations or "sales notes" which were returned by the buyer without objection but which buyer failed to sign. Each of the confirmations contained a provision that any controversy arising thereunder should be settled by arbitration. When the time arrived for delivery as specified in the confirmations, the seller charged the buyer's account and mailed invoices covering the merchandise. The buyer retained all the invoices without objection. While buyer accepted and paid for the merchandise deliverable pursuant to certain of the confirmations, he refused to accept or pay for the balance. When the buyer refused to submit to arbitration, the seller applied to court for an order to compel him to do so, but was met with the affirmative defense that the contract fell within the New York Statute of Frauds.[6]

Reversing the lower Court, the Court held, with one Justice dissenting, that the statute of frauds could not be pleaded in bar of a motion to compel arbitration and that the only issue before it was whether or not the buyer, by receiving and retaining the writings, had become bound to arbitrate within the rule of the *Japan Cotton Trading Co.* case.[7] The case was remanded for a trial of that preliminary issue as provided by statute.[8]

The dissenting Justice apparently adopted the second solution above suggested and urged that the formal requirements of the New York Civil Practice Act[9] were in addition to and not in lieu of the general Statute of Frauds.

The third solution was adopted by the Justice at Special Term before whom the motion initially was prosecuted, who held in a brief memorandum[10] that since the agreement violated the

[5] *Exeter Manufacturing Co.* v. *Seth Marrus*, 5 N. Y. S. (2d) 438 (1938, not yet officially reported).

[6] N. Y. Personal Property Law, Sec. 85.

[7] See Note 4, *supra.*

[8] N. Y. Civil Practice Act, Sec. 1450. Counsel for the litigants have since advised that the case was settled while on appeal to the Court of Appeals.

[9] See Note 3, *supra.*

[10] N. Y. L. J., Mar. 26, 1938 (not officially reported). The full text reads as follows: "Upon the foregoing papers this motion to proceed to arbitration is denied. The agreement violates the statute of frauds and the arbitration would be academic (assuming that a contract to arbitrate exists)".

statute of frauds, an arbitration pursuant thereto would be academic.

Of the foregoing views, the first would appear not only to be the most sound as a matter of law, but also best designed to advance the public policy of fostering arbitration. Most of the so-called "progressive" arbitration statutes provide that upon motion to compel arbitration, the court shall consider only the questions as to whether a contract to arbitrate was made, and whether the adverse party failed to comply therewith and if both questions be answered in the affirmative, the court "shall" enter an order directing the parties to arbitrate.[11] An exception is made, however, in a case where grounds exist in law or in equity for the revocation of such a contract.[12] Thus, the only questions before the court upon such a motion relate entirely to the *contract to arbitrate*—the only portion of the contract which the moving party is seeking court aid in enforcement. As the Court stated in the *Exeter* case:

> "On a motion to compel arbitration the only contract with which the court is directly concerned is, therefore, the 'contract to settle by arbitration'. It is as to that specific agreement that a preliminary issue as to its existence may be raised under Section 1450 Civil Practice Act.
>
> "The provisions of Section 1449, Civil Practice Act, with respect to arbitration concerning future controversies merely require that the contract between the parties 'be in writing'. It is significant that in this same section there is a requirement with respect to a submission concerning existing controversies that the same shall be void unless 'some note or memorandum thereof be in writing, and subscribed by the party to be charged therewith, or by his lawful agent'.
>
> "In view, therefore, of the provisions of Sections 1448 and 1449, Civil Practice Act, it would seem that the Statute of Frauds (Sec. 85, Personal Property Law) may not be pleaded in bar of the motion to compel arbitration if there is a contract in writing between the parties, though not signed by the party against whom arbitration is sought. Article 84 has its own peculiar and sole statute of frauds in Section 1449, Civil Practice Act. All other questions are not the concern of the court but are for the arbitrators."

If the portion of the agreement relating to arbitration be regarded as separable from the remainder, as the New York

[11] See, for example, N. Y. Civil Practice Act, Sec. 1450.

[12] See, for example, N. Y. Civil Practice Act, Sec. 1448. The statute of frauds does not, in most states, constitute such a ground—it simply creates a new defense and introduces a new rule of evidence. *Crane* v. *Powell*, 139 N. Y. 379 (1893); 27 C. J. 309.

courts have held,[13] it is doubtful whether a statute of frauds, which by its terms is limited to contracts for the sale of goods, could logically be said to have any application at all, and it was such a statute that was before the Court in the *Exeter* case. The most that could be urged would be that if the statute of frauds rendered unenforceable the portion of the contract relating to the sale of goods, any arbitration with respect thereto would be idle. The chief practical difficulty with that approach is that, if applied logically, it would frequently permit or require a court on motion to compel arbitration to hear and determine the dispute sought to be arbitrated. The mere fact that a defense of the statute of frauds is statutory would seem to give it no preferred position over or require any different treatment from other defenses, either affirmative or negative. Thus, if the court were to determine the validity of such a defense in order to make certain that any resulting arbitration would not be academic, it would lead to the manifest absurdity that in many cases the only disputes as to which arbitration could be compelled would be those which the court had already resolved in favor of the party seeking to compel the arbitration.

The foregoing discussion has dealt only with the situation in which there is a dispute between the parties as to whether the statute of frauds is applicable; where both the parties admit the applicability of the statute, they in effect would admit that the contract for the sale of goods is unenforceable. In such a case there would seem to be no more reason for the court to compel arbitration than in any other case where the parties admitted that there was a complete defense to the contract for the sale of goods, such, for example, as an accord and satisfaction. But it is submitted that the denial of a motion to compel such an arbitration should not rest on the ground that the defense goes to the contract to arbitrate, but rather should be based on the fact that there is no arbitrable controversy between the parties within the terms of the arbitration contract. Arbitrators, of course, deal with the same kind of controversies that are dealt with by the courts,[14] so that admittedly there would be no dispute or controversy susceptible of arbitration. In practice, however, such a question would rarely arise, since it is doubtful

[13] In support of that proposition see also *In re Albert*, Sup. Ct. Spec. Term, Pt. I, N. Y. L. J., Mar. 12, 1936, p. 1277.

[14] *Matter of Buffalo and Erie Ry. Co.*, 250 N. Y. 275, 279 (1929).

whether any party would attempt to compel an arbitration in the face of his own admission that there is a complete defense to the contract to be arbitrated.

It would appear that this aspect of the question was not before the Court in the *Exeter* case, since it was first raised by respondent in his answering affidavits, and no admission of the allegation appears of record. In fact, the application of the statute appeared to be one of the main disputes, if not the only dispute, between the parties. The Court, therefore, was not required to go beyond holding that it was limited to questions relating to the validity of the arbitration contract and respondent's default thereunder. The dissenting Justice likewise did not treat the case as involving an admission, since it was his view that the Court should have ordered a jury trial on the issue of the applicability of the statute, which would have been patently unnecessary if the matter had not been in dispute.

In the light of the foregoing considerations, it would seem that the decision in the *Exeter* case is sound, and that the common law rule that submissions must satisfy the statute of frauds has no valid analogy to contracts to arbitrate future controversies under the modern type of arbitration statute in this country.

COMMENTS ON CASES

Waiver of Arbitration Clause in Admiralty Cases. Two decisions were handed down on the same day recently by Paterson, D. J., Federal District Court, involving the question under what circumstances a civil suit may be stayed pending arbitration and, more particularly, what the effects are of the bringing of an *in personam* action and of the instituting of limited liability proceedings on the enforceability of an arbitration clause in a charter party.

In the first of these cases, the owner filed libels *in personam* against the respective charterers of its vessels, "Belize" and "Nidareid", alleging that each of said charterers had damaged the vessel chartered to it during the term of the charter party and had re-delivered it in a damaged condition. In each libel the owner stated that it "reserved" the right to proceed to arbitration. Neither of the respondents excepted to the libel against it nor demanded arbitration; each answered the libel, thereby

joining issue on the merits, and attached interrogatories addressed to the libellant. The libellant excepted to the interrogatories, but thereafter moved to require the respondent to proceed to arbitration and for a stay of the cause pending such arbitration. The Court held that, although either side initially had the right to compel arbitration, both had repudiated such right by pleading to the merits without demanding arbitration, and by such conduct had submitted the case to the Admiralty Court.

The attempted reservation in the libel was held futile, inasmuch as the facts were fully known to the libellant at the time of such attempted reservation. Section 8 of the Arbitration Act (9 U. S. C. A.), granting the Court jurisdiction where a suit *in rem* had been instituted or a suit *in personam* with a clause of foreign attachment, was held inapplicable since the suits involved were both *in personam* and had not been commenced by foreign attachment. Suits *in rem* and *in personam,* with clause of foreign attachment, usually result in obtaining security for libellant's claim, and one who begins suit in this way does not necessarily repudiate his right to arbitration, inasmuch as the suit may have been so commenced in order to obtain security, with the view of thereafter having the merits decided by arbitration. Libellant's motion to compel respondents to arbitrate and for a stay seems, therefore, to have been properly denied.

In the second cause, a vessel sank at sea and, with her cargo, became a total loss. She was operated at the time under a charter party containing a clause providing for arbitration in London. The owner of the lost cargo sued both the owner and the charterer of the vessel *in personam,* whereupon the charterer impleaded the owner in that suit, claiming that, if it was held liable for the cargo loss, it would have a right to recover over against the owner under the charter's provisions. The owner filed a petition for limitation of liability, pursuant to R. S. 4283-4285, 46 U. S. C. A. 181-195, and a week later amended this petition by reference to the arbitration clause, with a demand that, in case the charterer filed a claim in the limitation matter, all proceedings relative thereto should be stayed pending arbitration in London. The charterer did file such a claim in the limitation proceedings and the petitioner moved for a stay on such claim pending arbitration in London. The Court held that the owner had not waived arbitration by the filing of this petition for

limitation of liability and was entitled to have the merits of the controversy with the charterer decided by arbitration outside the limitation proceedings. The owner was held to be not in default in proceeding with arbitration and not to have taken any action inconsistent with his demand for a stay. His motion for a stay was, therefore, granted.

The distinction between the above cases is that, in the first, the owner had itself commenced direct suits in Admiralty against the charterers based on the charterer's obligation contained in the charter party, thereby showing his intention to repudiate the arbitration agreement contained in the charter party; whereas the second case was not initiated by the vessel owner but by the cargo-owner (not a party to the charter) against the owner and charterer of the vessel. The filing of the petition for limitation of liability by the owner, although a new proceeding, was in effect a defensive operation against the cargo-owner's suit. It was not a direct suit against the charterer, who came into the proceeding only indirectly upon filing its claim which was contingent upon its being held liable to the cargo-owner under its bill of lading contract and upon its showing a breach of the charter obligations by the owner. The petition for limitation of liability, having been amended to demand the right of arbitration of any such claim thereafter filed by the charterer, was in no wise a repudiation of the right of arbitration since it was not inconsistent with a determination of the merits of the claim by arbitration. The injunction granted in limitation suits staying proceedings in other courts against the owner is occasionally relaxed and modified to permit such suits to proceed to the point of determining liability (*Langnes* v. *Green*, 282 U. S. 531; *Larsen* v. *Northland*, 292 U. S. 20) and, where the vessel owner requests it, there is no reason why it should not be allowed.

It, therefore, clearly appears that the Court was right in denying the motion for the stay in the first cause and in granting it in the second. *Rederi A/S Nidaras*, libellant, v. *Steamship Owners' Operating Company, Inc.*, respondant (and another case), D. C., S. D. N. Y., Sept. 16, 1938 (1938 A. M. C. 1342);[*] *Petition of Court Line, Ltd.*, owner of S. S. "Quarrington Court", for limitation of Liability, D. C., S. D. N. Y., Sept. 16, 1938 (1938 A. M. C. 1358).[1]—GEORGE C. SPRAGUE.

[1] American Maritime Cases.

REVIEW OF COURT DECISIONS

BY

WALTER J. DERENBERG

NEW YORK SUPREME COURT, SPECIAL TERM

Demand for Bill of Particulars in Civil Action as Waiver of Arbitration Agreement. Motion to stay the trial of an action and to compel arbitration. Petitioner and respondent entered into a written agreement providing for the storage of personal property in petitioner's warehouse. Respondent claims that certain articles were lost through the negligence of the petitioner during the time of storage. In February 1938, respondent commenced a civil action in the Municipal Court to recover the value of the lost articles. In the answer, petitioner pleaded as a separate defense that under the terms of the storage contract, any controversy arising thereunder was to be submitted to arbitration. The sole objection made to the motion to compel arbitration is based on alleged laches on the part of petitioner in applying for arbitration. *Held,* motion to compel arbitration and motion to stay the Municipal Court proceedings denied. After joinder of issue on February 23 in the Municipal Court, the respondent's attorney expressed a willingness to arbitrate. On June 8, 1938, respondent's lawyer in a letter to petitioner's lawyer, wrote as follows: "Unless you arrange for arbitration immediately upon receipt of this letter, I shall without further notice place the case on the calendar for trial in the Municipal Court." In the answering letter of June 10 the following statement was made: "May I suggest that you pursue all the remedies that your client has at law and that you do not call upon this office for any further action in the matter." After receiving this reply respondent served and filed a notice of trial and demand for jury trial. The action was noted for trial for September 15, 1938, but was adjourned to October 11 upon petitioner's request. On October 7 petitioner's attorney served a demand for bill of particulars. On October 10, upon respondent's request, trial was adjourned to October 24. On October 14 petitioner's lawyer wrote a letter containing the following statement: "We are going to insist upon arbitration in this matter."

The law is well settled that the right to an arbitration may be lost by laches. While the serving of an answer in the municipal court action did not, in itself, constitute a waiver of the right of arbitration, the subsequent correspondence clearly amounted to a waiver of the right to arbitrate on petitioner's part. The demand for a bill of particulars in conjunction with the letters written by petitioner constituted a waiver and an invitation to the respondent to proceed with the Municipal Court action (citing *Matter of Haupt* v. *Rose,* 265 N. Y. 108). *Matter of Reilly Storage Warehouse Corporation,* Sup. Ct., Spec. Term, Pt. I, N. Y. L. J., November 19, 1938, p. 1713, Noonan, J.

Sufficiency and Finality of Award. Motion to vacate an award. In July 1930, petitioner and the respondent insurance company entered into an agreement under which claims against the company, based upon over 300 policies,

were settled and compromised. These policies had all been written in Russia before the World War and were then transferred to the petitioner by mesne assignments. In said agreement petitioner released the company from the claims on these policies upon payment of a certain agreed settlement amount with respect to each policy, provided a satisfactory proof of claim was submitted. With such proof of claim petitioner was to file a so-called "notice of completion", whereupon the respondent reserved the right, within 20 days, to file a "notice of rejection". Grounds not stated in such notice were deemed waived in case petitioner would stand upon the sufficiency of his proof of claim. Petitioner had the right, within 30 days after rejection, to require arbitration so that the validity of the grounds stated in the "notice of rejection" would be determined by arbitration as stipulated in the agreement.

In the instant case, four such proofs of claim were rejected by respondent. An arbitration was had and the majority of the arbitrators held the company's reasons for rejection to be valid. Petitioner then asked the court to vacate the arbitrator's award. *Held*, motion denied. Petitioner was required by the contract to prove by affidavit in each case certain material facts as, for instance, that the insured, or the beneficiary or the heirs, were at no time citizens or residents of the Soviet Union. The contract further provided that if such affidavit of non-Soviet citizenship could not be made by the respective insured or beneficiary, there must be an affidavit by some other person personally acquainted with the insured. In addition to that, a so-called affidavit of identity had to be furnished under the contract by someone personally acquainted with the insured. By the form required the affiant had to state that he had positive knowledge as to the insured's identity and non-Soviet citizenship. The present controversy concerns the sufficiency of an affidavit made by the petitioner himself, as to the identity and non-Soviet citizenship and residence of one of the insured. Petitioner stated in that affidavit that he had positive knowledge of the relevant facts and described the facts and circumstances which enabled him to give such positive identification. Respondent rejected the affidavit on the ground that it did not satisfy the requirement of the agreement of July 1930. Respondent alleged that petitioner had not sufficient factual knowledge of the facts averred by him. This, the arbitrators found, was a valid rejection under the evidence as presented.

The further allegation of petitioner that the award was void for vagueness and that it failed to give him any indication as to what additional proof, if any, he was to supply to the respondent to obviate the reasons advanced by it for the rejection of the affidavit was also rejected by the court. "The arbitrators were not required to counsel petitioner as to what further proof he should furnish. They had only to determine whether the proof already furnished was properly rejected. Since there is nothing to prevent petitioner from presenting further and better proof, no injustice was done to him by the award." *Matter of Tillman*, Sup. Ct., Spec. Term, Pt. I, N. Y. L. J., November 19, 1938, p. 1712, Noonan, J.

Error of Law on Face of Award. Application for a temporary injunction to enjoin defendant from applying for an order confirming an arbitration

award. The action itself is for a permanent injunction for this relief. The parties, on written agreement, had submitted to arbitration certain controversies arising from a sales contract. The dispute involved the devaluation of the Guilder and the resulting increase in the rate for ocean freight. Three arbitrators were selected, one of whom was a lawyer, and an award in favor of the defendants was made, to which was annexed a comparatively lengthy opinion. The plaintiffs do not challenge the award because of fraud or misconduct, but base their claim on the ground that the award should be set aside for error of law on the face thereof in accordance with a dictum in the case of *Fudickar* v. *Guardian Mutual Life Insurance Company* (62 N. Y. 392), where it was said: "If it appears from the award that the arbitrators intended to decide the case according to law and the grounds for their decision are set out, the case is brought within the exception to the general rule that the decision of the arbitrators is final and conclusive between the parties." *Held*, application denied. Said the court: "The reason why plaintiffs are proceeding by an action in equity is that they realize the impossibility of resisting an application to confirm in the absence of the elements of fraud or misconduct. . . . . I cannot see where plaintiffs have shown the right to a temporary injunction. The existence of the alleged error of the arbitrators is not free from doubt. Awards made by arbitrators will not be lightly set aside nor will plaintiffs suffer irreparable damage if the award is confirmed. There is no reason why the present action cannot be continued even after the confirmation of the award with the aid of a supplemental pleading." *McLean et al* v. *O'Brien-Padawer, Inc.*, Sup. Ct., Spec. Term, Pt. III, N. Y. L. J., December 13, 1938, p. 2113, Valente, J.

Power of Arbitrator to Issue Subpoena Duces Tecum. Motion to vacate subpoena *duces tecum*. *Held*, denied. "The collective agreement amply empowers the arbitrator to issue the challenged subpoenas and to inquire into the matters which form the basis of the inquiry. The court will not thwart the investigation or halt the examination in advance. The arbitrator selected by the parties can be depended upon to protect the rights of all parties. The court will not interfere with the proceedings before the arbitrator until and unless the need therefor clearly appears. No such showing is here made." *Sun-Ray Cloak Co., Inc.* v. *Unity Cloak Co., Inc.*, Sup. Ct., Spec. Term, Pt. I, N. Y. L. J., November 25, 1938, p. 1791, Collins, J.

Accountant's Report as Condition Precedent to Enforcement of Arbitration Clause. Motion to compel arbitration. This motion was brought by a former employee arising from a stock repurchase agreement with the former head of the corporation. Under the agreement, respondent was obligated to pay within 60 days after termination a certain amount for the stock purchased. Respondent claims that the motion should be denied because the controversy is not ripe for arbitration, since petitioner failed to comply with a condition precedent in the repurchase contract. It was provided in the agreement that in the event that petitioner "shall not accept a report of the said accountant" she may choose a certified public accountant at her own expense. If such certified accountant failed to agree with the firm accountant, the two were to choose a third whose decision would be final. *Held*, motion

granted. Petitioner did not choose her own accountant because she did accept the firm accountant's report and only draws different inferences from such report as to the actual book value of the shares. Having accepted the report, she has complied with the condition precedent. It was not contemplated that a private accounting arbitration should be ironed out as to the inferences from the report before arbitration could be had. It is for the arbitrators to draw the necessary inferences from the report. *Matter of Fitzpatrick*, Sup. Ct., Spec. Term, Pt. I, N. Y. L. J., November 18, 1938, p. 1691, Valente, J.

Industrial Arbitration—Right of Individual Employees to Enforce Arbitration under Collective Labor Agreements. Motion to compel arbitration. Petitioner (Portnoy) is a contractor engaged in the manufacture of cloaks and suits, and as such is employed by Aronow Bros., Inc., which latter firm is a jobber of cloaks and suits. Rose Shulman is, or was, an employee of Portnoy. The contractor, the jobber and the employees are members of respective associations which have entered into collective agreements. The employee, Shulman, is a member of the local union and complained to the union's officials that the compensation paid was inadequate. The complaint was made to her local union but no redress was obtained. She then engaged a lawyer to make the present application. *Held*, motion granted. Said the court: "Under the collective agreement between the American Cloak and Suit Manufacturers' Association and the International Ladies' Garment Workers' Union, any dispute arising shall be investigated and if the representatives of the parties are unable to agree, the matter is to be submitted to the impartial chairman. There is no provision for arbitration between employee and employer direct unless presented by the local union of which the employee is a member. In this case there seems to be a lack of a sponsor on the part of such local union. It seems that the local union of which the employee is a member is not in harmony with her claim against the employer. However, since the contractor and jobber both are willing to arbitrate the employee's complaint before the impartial chairman, it seems to me that the complaint should be so disposed of. The granting of the order herein is upon condition that the complaint of the employee shall be determined by the impartial chairman on the merits and shall not be disposed of because of some technical requirements of the respective contracts or the failure of the local union to present or advocate the cause on behalf of its member or the employee of the contractor." *Matter of Portnoy*, Sup. Ct. Spec. Term, Pt. I, N. Y. L. J., December 10, 1938, p. 2071, Black, J.

Industrial Arbitration—Acknowledgment of an Award by Arbitrator—Personal Investigation as Misconduct—Partial Invalidity of Award. Motion to confirm an award. In Section 5 of the collective agreement between the petitioner as President of the International Brotherhood of Pulp, Sulphite and Paper Mill Workers, Local No. 333, and the respondent employee, it was provided that the hourly wage rates to be paid to each of the employees should be determined on or before October 8, 1938, by an arbitrator designated by the Executive Secretary of the New York State Board of Mediation. The arbitrator was to make an award in writing, setting forth the individual

hourly rates. It was further provided: "The award so made by the arbitrator shall be deemed a part of this contract as if fully incorporated herein." An arbitrator was designated and the question of the hourly wage rate to be paid to certain named employees submitted to him. The arbitration submission provided that any award rendered should have the same force and effect as any judgment of any Court of the State of New York. An award was rendered on October 17, 1938, without being duly acknowledged by the arbitrator at that time. However, before this application to confirm was made, the arbitrator formally acknowledged the award on October 25, 1938. Respondent objects to the confirmation of the award on the ground that the award was invalid for lack of acknowledgment, that the arbitrator failed to take the oath, that the award in five instances exceeded the demands by the Union and that in one instance the arbitrator had made a personal investigation to aid his determination. *Held*, motion to confirm granted.

Said the court: "With regard to the acknowledgment, it is true that an unacknowledged award lacks efficacy, but such a defect may be cured by acknowledging the award prior to the motion to confirm. The contention that the arbitrator did not take the oath likewise has no force since, according to Section 1455 of the Civil Practice Act, the oath is deemed waived when the parties proceed with the arbitration without objection. With regard to the personal investigation made by the arbitrator, it is true that he stated, in making his award in the case of one employee, that in making a certain allowance he had taken into consideration and analyzed the contracts of different manufacturers and had also made a *personal investigation* to ascertain what a fair rate of wages would be. Such personal investigation was outside the arbitration submission and was improperly obtained, since no opportunity was afforded the employer to rebut. Such an act constitutes misbehavior which would lead to the vacating of an award. However, in the present case, this misconduct affected only one employee and therefore did not invalidate the entire award. Since with regard to this case the Union has submitted a consent that the award made to this employee be deemed amended so as to waive the increase awarded to the employee, the award is otherwise left unaffected and should be confirmed." *Matter of Herman, etc.*, Sup. Ct. Spec. Term, Pt. I, N. Y. L. J., December 20, 1938, p. 2237, Noonan, J.

Industrial Arbitration—Use of Adjustment Machinery as Condition Precedent to Arbitration. Motion to compel arbitration. The president of a local labor union petitions the court for an order directing arbitration as to certain disputes between the union and the Sheffield Farms Co., Inc. The respondent corporation is engaged in the manufacture and sale of milk products within and without the State of New York. The agreement contained provision for an elaborate adjustment machinery for the settling of labor disputes and provided in paragraph 7: "Should any and all disputes or controversies arise under or in connection with the terms and provisions of the agreement or in respect to anything not herein expressly provided for, but germane to the general subject matter of this agreement, which differences cannot be adjusted by the representatives of the union and of the company, the

same shall be submitted to arbitration. . . . ." The final sentence of paragraph 7 was as follows: "However, before any arbitration is requested, the union and the company shall first try and adjust the matter between themselves." The present dispute concerns the working conditions of the employees as affected by a reorganization project of the method and manner of distribution of respondent's products.

Held, motion denied. "The entire agreement is instinct with the understanding that arbitration was not to be resorted to until the grievances of the employees were submitted to the adjustment process provided by paragraphs 8 and 9 of the agreement. The arbitration clause, paragraph 7, makes this plain. . . . . However, there is no proof that the respondent has failed to use the adjustment machinery provided by the contract nor is there proof of any arbitrable dispute. Reorganization was permitted by the agreement and respondent claims, without contradiction, that it has already settled and is continuing to settle all grievances with the employees with the shop stewards in accordance with the adjustment machinery provided in paragraphs 6 and 9 of the agreement. *Matter of Basile as President, etc.* v. *Sheffield Farms Co., Inc.*, Sup. Ct., Spec. Term, Pt. I, N. Y. L. J., December 13, 1938, p. 2112, Noonan, J.

Industrial Arbitration—Scope of Arbitrator's Authority. Motion to vacate an award. The employer seeks to limit the arbitrator to a decision as to the merits of the alleged claims and to prevent him from deciding the question of damages which would have to be paid in case the Union's claim was upheld. *Held*, motion denied. The matters submitted to the arbitrator require that awards for damages be made in order that a definite and final disposition of the question in dispute could be achieved. It is not the intention of the statutes and cases to prevent an arbitrator from deciding the real issue of the case, *i.e.*, what award is to be made in the event that the Union's claims were upheld. *Matter of Dubin & Pincus, Inc.*, Sup. Ct., Spec. Term, Pt. I, N. Y. L. J., November 10, 1938, p. 1563, Church, J.

NEW YORK SUPREME COURT, APPELLATE DIVISION

Scope of Submission Agreement—Jurisdictional Basis for Arbitration. In July 1937, the plaintiff, a contractor, and the defendant, an owner, entered into a contract for the construction of a moving picture theatre for an agreed price. The construction contract was under the standard form adopted by the American Institute of Architects. In the contract document it was provided that certain specified matters should be submitted to arbitration in case of dispute. The plaintiff claims approximately $10,000 for extra work, labor and services performed and extra materials furnished and moves to compel defendant to arbitrate such claims. The lower court ordered defendant to proceed to arbitration of all claims, demands, disputes and controversies relating to the work and extra work, labor and services performed by the petitioner and extra materials furnished by it.

Held, reversed. "There are no provisions whatever in the contract document to the effect that *all* controversies arising under the contract should be arbitrated. Section 16 of the general conditions covers only claims for

extra cost of changes in work within the contract and requires a written order. Compensation for extra work is not arbitrable unless furnished under the written order of the architect or the owner, except 'in an emergency affecting the safety of life or of the work, or of adjoining property'. In such an emergency the contractor, according to Article 12, could act without special instruction by the architect or owner and claims arising on account of such emergency work were to be arbitrated. The petitioner makes no mention of any emergency; moreover the bare unverified conclusory assertion of an emergency would be wholly inadequate.

"The lower court also erred in finding that the plaintiff's claim would come within the scope of that clause of Article 12 which provides for arbitration of all matters in relation to payment, allowance or loss referred to in Article 3; it has been decided on several occasions that that clause refers to the amount to be paid or allowed for alterations made upon the written order of the architect; these are the limited 'matters of payment' referred to and they clearly do not embrace any and all matters of payment that may be in dispute." (Citing matter of *Priore* v. *Schermerhorn*, 237 N. Y., 16, 17; *Matter of 251 West 30th Street Corporation* v. *Joseph Elias & Co., Inc.*, 228 Appellate Division 616.)

It follows that there was no justification to require arbitration over the matters herein involved. "No one is under a duty to arbitrate unless by clear language he has agreed to do so; the contract must be to arbitrate the precise matters as to which arbitration is sought; and on this depends both the jurisdiction of the arbitrator and the power of the court. . . . . Controversies which the parties have not agreed to arbitrate are to be submitted to and disposed of by the established judicial tribunals." *In the matter of Eagar Construction Corporation* v. *Ward Foundation Corporation*, N. Y. L. J., December 6, 1938, p. 1975.

Excess of Authority of Arbitration Committee Invalidates Award—Bias of One Arbitrator Does Not Justify Declaring of Vacancy of Office of Entire Board. Appeal from an order confirming an award of arbitrators. In 1936 the parties entered into a sales agreement under which all controversies arising thereunder were to be submitted to arbitration in accordance with the Arbitration Rules of the Silk Association of America, Inc. When a controversy arose, the parties proceeded to arbitrate in accordance with the Rules of the National Federation of Textiles, successor to the Association. Three arbitrators were selected and hearings were completed on April 27, 1937. Before the award was rendered, appellants complained to the Committee on Arbitration concerning the alleged partiality of the arbitrator designated by respondent and requested that a new board be chosen. The Committee, which acts as a governing body to administer and interpret the rules, and its administrative assistant who was present at all of the hearings, investigated the matter and made a finding that the conduct of respondent's arbitrator showed definite prejudice and bias. The Committee ruled, therefore, that all three arbitrators be disqualified and another board be elected.

Respondent refused to participate in the designation of the new arbitration board which, however, was nevertheless appointed and, in the absence

of respondent, submitted an award on July 13, 1937, in favor of appellant. Thereafter and despite its removal by the Committee, the first board also made a formal award on July 28, 1937, signed by two of its members in favor of respondent. The Special Term Court confirmed this latter award on November 1, 1937, and denied confirmation to the award of the second board of arbitrators. *Held,* reversed.

The award of the first board should not have been confirmed for the reason that one of the arbitrators who was properly disqualified took part in making the award. The second award, however, is also invalid since the Committee exceeded its powers in removing all three arbitrators of the first board for the misconduct of only one. The Committee was without authority under its own rule to resubmit the dispute to a wholly new board when two of the original arbitrators were not properly disqualified.[1] While the Committee may have been authorized under Rule 7 to remove the arbitrator at any time before the delivery of a formal award, it had no authority to declare three vacancies in the absence of proof of bias or prejudice on the part of the other two arbitrators.

The interests of justice require that a rehearing of the controversy be had before a board of three new arbitrators to be chosen in accordance with the Rules of the Association. The matter is remitted for further proceedings to new arbitrators thus to be chosen. *In re Oltarsh,* 7 N. Y. Supp. (2d) 859, First Dept., 1938.

FOREIGN JURISDICTIONS

(England) Arbitrator's Power to Grant Complete and Effective Relief. A building contract provided for payments by the employer to the contractors on interim certificates by the architects. An arbitration clause in the contract provided for arbitration, among other questions, of any dispute as to the withholding by the architect of a certificate to which the contractor might claim to be entitled. It was further provided that the arbitrator should have power to open up, review and revise any certificate and to determine all matters in dispute which should be submitted to him and of which notice should have been given in the same manner as if no certificate had been granted. When, in 1935, the architect refused to grant the tenth certificate because of certain complaints made by the employer, the contractors alleged that a dispute had arisen for settlement by arbitration and

[1] Rule 7 of the Arbitration Rules of the Association then referred to by the Court runs as follows:

> *Successor Arbitrators.* If an arbitrator shall not file a written acceptance of appointment with the Bureau within seven days after notice thereof has been mailed to him, or if the Committee shall determine that an arbitrator is not impartial and disinterested, or if an arbitrator shall resign or otherwise fail or cease to act, then the Committee may declare a vacancy to exist. A successor arbitrator shall be appointed in the manner set forth in these Rules for the appointment of the predecessor arbitrator, unless the Committee in its absolute discretion decides to appoint the successor arbitrator.

sent the architect the submission. In 1936 the arbitrator rendered an award in which, among other items, he awarded £7,500 to the contractors. Upon petition by the employer to vacate the award, the High Court of Justice denied the petition.

Held, affirmed. It was alleged by the employer that the reference was specifically limited to the question whether the architect had improperly refused to issue a certificate, but that the arbitrator could not award a sum to be paid to the contractors forthwith. The question was: What was the matter which, under the letter from the contractor to the employer, was referred to the arbitrator? The Court of Appeal followed the case of *Brodie* v. *Cardiff Corporation* (1919), A. C. 337, where it was held that an arbitrator having jurisdiction to decide whether or not something should have been done by an architect or engineer which had not been done, has power by his decision to supply the deficiency and order the party to do that which it should have done before. Applied to this case, if the arbitrator came to the conclusion that the certificate should have been granted, he could act as if it had in fact been granted and order the sum to be paid. (It was so held also *In re Nott and the Cardiff Corporation*, 2 K. B. 146, 1918.) *Prestige & Co., Ltd.* v. *Brittall*, Ct. of Appeal, 82 Sol. Jnl. 929 (1938).

COMPENSATING AUTOMOBILE VICTIMS

> Administrative tribunals which act promptly and can readily apply fixed standards are better fitted to cope with this problem [compensation to victims of accidents caused by automobiles] than are the courts. We just cannot afford to use the time of our highly paid judges and the cumbersome and expensive machinery of the judicial process in dealing with the mass of accident cases. We cannot ask those who are hurt to share one-third or one-half of whatever recovery they may make with an attorney. We cannot permit the insurance company to take advantage of the delay of trials so as to force unfair settlement. (Stanley M. Isaacs, President, United Neighborhood Houses of New York, in a letter to *The New York Times*.)

BOOK REVIEWS AND NOTES

Personnel and Labor Relations. By Dale Yoder. Prentice-Hall, Inc., New York, 1938, 644 pp. $5.35.

For the specialized student, who aspires to identify himself with industrial management, Professor Yoder's book, complete with classroom exercises and a comprehensive bibliography, is a convenient and up-to-date text. It inclines to be somewhat dogmatic, especially in its general assumption that management may set a course in labor policy without a great deal of advance reference to the financiers in control of a corporation or to organized labor. Therefore, there is more of value in its sections on working conditions than in the chapters on working relations. For the practical lesson of recent times has been that management cannot count on acceptance of a labor formula when it is presented as a *fait accompli*, no matter how humane it may be. Efficiency evolved without labor participation is a frustrating thing, especially in large mass production enterprises where the individual employee is bound to be an impersonal unit. Although Professor Yoder does not dwell on this aspect of modern industrial relations at any great length, he has reckoned with an extraordinary amount of pertinent literature in the suggested collateral reading at the end of each chapter.

His book is most valuable of all in its clear definitions of job analysis, classification and training; hour and wage systems; efficiency rating; morale and health, and so on. It should give the student a grasp of all the essentials of modern personnel practice, without which the continuous experiment of human relationships on the job cannot be satisfactorily directed. The volume, in addition to its excellent references and bibliography, contains valuable suggestions for research and the use of statistics, a number of appendices (including the National Labor Relations Act) and an index.—VICTOR WEYBRIGHT.

Trade Associations in Law and Business. By Benjamin S. Kirsh, in collaboration with Harold Roland Shapiro. Central Book Company, New York, 1938. pp. 399. Price $5.00.

The place of trade associations in American life is becoming increasingly important and the author of *Trade Associations in*

Law and Business very appropriately quotes the late Mr. Justice Cardozo, in his statement that:

> "More and more in its social engineering, the law is looking to co-operative effort by those within an industry as a force for social good."

About ten years ago Benjamin Kirsh published a very much quoted book on the legal aspects of trade associations and the new volume follows the same general chapters, but with the advantage of ten years of experience and observation of such vital cooperative movements as the National Industrial Recovery Act, the Robinson-Patman Act and of anti-trust decisions of the Supreme Court, especially the case of the *Sugar Institute* v. *the United States*, decided in 1936. The treatment of the subjects, moreover, is from the economic value of the activities as well as their legal aspects. The understanding and helpful analysis of the value to the business man of various cooperative activities in the fields of statistics, cost accounting, trade relations, standardization, foreign trade functions, etc., are readable to the layman and of current interest.

The change in market pressure from a seller's market to a buyer's market, in the ten years since publication of the first of Mr. Kirsh's volumes, is brought out in the treatment of the various chapters. Emphasis is given to the effect of strong buying groups, with comments on what the author believes to be the limited possibilities of the producers or distributors association in this country.

To students of commercial arbitration, Chapter IV, Trade Relations of Trade Associations, is of special interest. In tribute to the cause of commercial arbitration (p. 103), Mr. Kirsh says:

> "The two most potent instruments available to trade associations for the achievement of these ends are codes of ethics and commercial arbitration."

And later says:

> "Arbitration assumes a high place in efforts to improve trade relations. It is inexpensive, expeditious, and represents the practical decisions of business men familiar with the matter in dispute. . . . .
>
> "Arbitration is not necessarily employed even when submission to arbitration is signified in a contract. Frequently, the mere existence of arbitration machinery results in the greater use of intermediate steps such as amicable settlement and mediation, in the determination of the multitude of controversies involving small trade abuses which are not serious enough for arbitration."

Examples are cited of uniform contracts containing provisions for arbitration and comments made on the ideal form of arbitration procedure with the conclusion that:

> ". . . . tendency to organize joint arbitration boards, composed of the various component elements of an industry, is achieving very encouraging results in securing the adoption of and adherence to uniform arbitration clauses by all of the parties to a commercial transaction."

The volume includes a table of cases cited and a satisfactory index, both as to subjects and persons. The author has given a fair and impartial treatment of the functions of the trade associations in this country and the book should be valuable, not only to members of associations and members of industry, but to students as well.—I. L. BLUNT.

Lawyers and the Promotion of Justice. By Esther Lucile Brown. Russell Sage Foundation, New York, 1938. pp. 302.

This study was published by the Russell Sage Foundation as the fifth in the series of studies of social conditions in this country and particularly the status of the various professions and their progress. It searches very deeply into the sources of the various crises with which the legal profession is confronted today. Miss Brown, rightly, does not take the admission to the bar and the number and the income of existing lawyers as her starting point, but devotes about one-third of the study to a description and critical analysis of the present prerequisites of legal education in this country. It is stressed throughout the book that any reform, in order to achieve its aim, must start at the point at which the student enters the law school.

The study proceeds to describe the activities of the various national bar associations, their origin and growth and their decisive influence in raising the standards prevailing in the legal profesion. With this background, Miss Brown then takes up the 'outstanding weaknesses in the administration of justice', among which she numbers the delay and uncertainty in the prosecution of civil cases, the prohibitive expense of litigation, the too frequent illustrations of unprofessional conduct and disbarment and, generally, a lack of interest in the promotion of justice. The last part of the book—and certainly the most important one—deals with new trends in the promotion of justice. Court reform and the establishment of new tribunals is discussed and it is in this

connection that the growth of the arbitration movement both in the commercial and industrial field is stressed. To illustrate the important place that arbitration has made for itself in recent years, a résumé from the report of the American Arbitration Association upon its Tenth Anniversary in 1936 is given. The function of the American Arbitration Tribunal and its operation is described quite fully.

Finally, the need for adequate legal assistance for poor persons, the work of the Legal Aid Society and the work of such bodies as the Industrial Accident Boards and Commissions are set forth in the report.

As a whole, this report must be considered as a worthy continuation of the invaluable work already done by the Russell Sage Foundation research staff. It furnishes a wealth of information and facts concerning the present status of the legal profession in this country to all those who are interested in advancing the ideals of the profession and in the promotion of justice.

Die Rechtspraxis der Kartelle und Konzerne in Europa (*The Legal Status of Cartels and Concerns in Europe*). By Dr. Heinrich Friedländer. Zürich, 1938, pp. 351.

It is self-evident that the European international cartels have never found an exact counterpart in the American system of trade regulation for the reason that most cartels might be held in restraint of trade and violative of the anti-trust laws. Consequently, the legal structure and practical operation of such cartels have received comparatively little attention in this country although, as proven by the book here under review, a tremendous amount of invaluable information may be gleaned therefrom. The author, a member of the Berlin Bar and an internationally known expert in this field, not only gives us a discussion of the various legal foundations of cartels in all European countries, but goes to the very root of the international agreements actually in existence and discusses the various methods by which it has been sought to bring such agreements into effect and enforce them in case of controversy.

A considerable part of this volume deals with virgin territory as far as legal research is concerned. This is particularly true of the author's frequent references and discussions of the arbitration machinery as provided in various international cartels.

In a section called "International Procedural Aspects of Cartel Law" reference is made to the various permanent cartel arbitration courts which have been in operation for many years, and difficult questions of conflict of laws as well as of the scope of the authority of such arbitration courts are considered. In addition, practical hints are given as to how the arbitration clauses should be formulated in individual cases. Moreover, it is exceedingly interesting to note that some questions that have recently confronted our own courts in domestic arbitration cases find their exact counterpart in the international sphere.

Unfortunately, space does not permit delving any further into the many interesting problems that a reading of this book brings to light with regard to the feasibility and scope of arbitration clauses in international cartels. THE JOURNAL has been informed, however, that there will shortly be an English translation of this work and, moreover, expects to publish in its next issue an article by the author of this book, dealing specifically with the arbitration aspects of international cartels.—WALTER J. DERENBERG.

NOTES

Primer of Labor Relations. The Bureau of National Affairs, Inc., Washington, D. C., has recently published a *Primer of Labor Relations* as a guide to employer-employee conduct. The Primer, prepared by the staff of the Labor Relations Reporter, contains a wealth of information in its 62 pages, simply and concisely stated, on such topics as: Meaning of "Employee"; Interference; Company Unions; Refusal to Bargain; Elections and Certifications; Bargaining Units; Labor Contracts; Union Rights and Responsibilities; Strikes, Lock-outs, Picketing and Injunctions, and Conciliation and Arbitration.

Symposium on Labor Relations. A series of addresses delivered over radio station WBBC and arranged through the cooperation of the Committee on Labor Problems and Industrial Relations and the Committee on Public Relations of the Brooklyn Bar Association, has been published under the title of *Symposium on Labor Relations.* Of particular interest to the student of methods for the settlement of industrial disputes are the articles by Robert Abelow, Chairman of the Committee on Labor Problems

and Industrial Relations, on *Industrial Relations in Great Britain*, and by Stuart H. Steinbrink, on *The Peaceful Adjustment of Industrial Disputes.*

The Story of Arbitration. Under the title *You Don't Need to Sue*, *Fortune* magazine for December (1938) published one of the most comprehensive stories ever to be printed of the background of the arbitration movement in this country and the growth and activities of the American Arbitration Association and the types of cases which come before its Tribunal. The article contains an appraisal of the advantages derived from the practice of arbitration and tells how "some 11,000 pairs of litigants have sidestepped those [litigation] costs by sitting down at a table and letting a group of honest, experienced business men act as judges."

The Public and the Bar. The *American Bar Association Journal* for November, 1938, reprints an address made by Paul Bellamy, Editor of the *Cleveland Plain Dealer*, before the opening session of the fifth annual meeting of the Junior Bar Conference of the Association on "The Public and the Bar", in which the speaker dealt with some of the causes of public criticism of the legal profession. Tempering his "indictment" with a Scriptural reminder that whom the Lord loveth He chasteneth, Mr. Bellamy cited the four most widespread criticisms of the Bar. These are, he said: "First, the public thinks that you give yourself too many airs and pretend to a knowledge of ultimate truth which you do not possess. . . . . Second, the public thinks you take a month to do a job which could be finished, with reasonable diligence, in a day. . . . . Third, the public thinks that the court and the lawyers cooperate to make a game, or at least a test of wits, out of what should be a solemn process to arrive at justice. . . . . Fourth, the public thinks you charge too much for your services."

An Experiment Worth Trying. In a note in the *Massachusetts Law Quarterly* for October-December, 1938 (Vol. XXIII, No. 4), the Editor calls attention again to a suggestion made in 1930, in the Report of the Special Commission on the Motor Vehicle Insurance Law, for the establishment of a small claims procedure for judicial arbitration of motor vehicle cases. Under the Commission's proposed plan, claimant and defendant would be able

to submit the claim to the District Court in which the accident occurred, for a judicial arbitration without jury, without rules of evidence, without appeal on the facts or, unless requested by both parties, on questions of law.

BOOKS RECEIVED

The Law of Treaties. By Arnold Duncan McNair. Columbia University Press, New York, 1938.

Lawyers and the Promotion of Justice. By Esther Lucile Brown. Russell Sage Foundation, New York, 1938. (Reviewed in this issue.)

Social Problems in Labor Relations. By Paul Pigors, L. C. Lennedy and T. O. Armstrong. McGraw-Hill Book Company, Inc., New York, 1939.

A FAMILY LITIGATION

This unseemly litigation between father and son, in which the wife and mother has been injected, should have been avoided. From the conflicting affidavits it is impossible to determine the precise truth. Obviously, however, the defendant did not obtain the plaintiff's business by fair means. His father, the plaintiff, was away and had no knowledge of what was occurring. The defendant paid nothing for a business which evidently has some value—otherwise the defendant would not insist on remaining therewith. It would, however, serve no good purpose to close the plant; both parties would suffer thereby. . . . . The action is set down for trial in Special Term, Part III, for October 10, 1938. Meanwhile, the parties should endeavor to compose their differences. If necessary, let them invoke arbitration. (Justice Collins of the New York Supreme Court, as reported in New York Law Journal, September 23, 1938.)